No. 77—

In the Supreme Court of the United States

OCTOBER TERM, 1977

77-521

GENERAL MOTORS CORPORATION, PETITIONER,

v.

UNITED STATES OF AMERICA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

General Motors Corporation ("GM") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) has not yet been reported. The opinion of the district court denying cross-motions for summary judgment (App. D) is reported at 65 F. R. D. 115. The district court's post-trial memorandum of findings and conclusions (App. E) is not reported.

JURISDICTION

The judgment of the court of appeals in these consolidated cases (App. B) was entered on June 28, 1977.[1] A timely petition for rehearing with suggestion for rehearing *en banc* was denied on August 18, 1977 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether in applying the key definitional provision of the National Traffic and Motor Vehicle Safety Act requiring that a manufacturer recall automobiles containing a defect which poses an "unreasonable risk" of accidents, injury and death, the court of appeals disregarded the intent of Congress by adopting a *per se* rule which precludes introduction of evidence on the existence and degree of risk.

STATUTORY PROVISIONS INVOLVED

Section 102(1) of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1391(1) (1970),[2] provides:

> "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor

[1]This petition seeks review of the judgment entered in two separate cases which were consolidated for trial and on appeal. *See* p. 8 n.5 *infra*.

[2]The Act was amended in 1974 in respects not material to this litigation. *See* p. 6 n.4 *infra*.

> vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

Section 102(11) of that Act, 15 U.S.C. § 1391(11) (1970), provides:

> "Defect" includes any defect in performance, construction, components, or materials in motor vehicles or motor vehicle equipment.

Section 113(e) of that Act, 15 U.S.C. § 1402(e) (1970) (amended 1974), provides:

> (e) If through testing, inspection, investigation, or research carried out pursuant to this subchapter, or examination of reports pursuant to subsection (d) of this section, or otherwise, the Secretary determines that any motor vehicle or item of motor vehicle equipment—
>
> (1) does not comply with an applicable Federal motor vehicle safety standard prescribed pursuant to section 1392 of this title; or
>
> (2) contain a defect which relates to motor vehicle safety;
>
> then he shall immediately notify the manufacturer of such motor vehicle or item of motor vehicle equipment of such defect or failure to comply. The notice shall contain the findings of the Secretary and shall include all information upon which the findings are based. The Secretary shall afford such manufacturer an opportunity to present his views and evidence in support thereof, to establish that there is no failure

of compliance or that the alleged defect does not affect motor vehicle safety. If after such presentation by the manufacturer the Secretary determines that such vehicle or item of equipment does not comply with applicable Federal motor vehicle safety standards, or contains a defect which relates to motor vehicle safety, the Secretary shall direct the manufacturer to furnish the notification specified in subsection (c) of this section to the purchaser of such motor vehicle or item of motor vehicle equipment as provided in subsections (a) and (b) of this section.

STATEMENT

This case of first impression presents a question of great significance concerning the proper construction of the critical statutory term "unreasonable risk" which defines the scope of the motor vehicle recall provisions of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* (1970) (amended 1974) ("the Act" or "the Safety Act"). Two judges in the District of Columbia Circuit—the trial court and the dissenting judge in the court of appeals—agreed that application of that term raised "a matter of fact, not of supposition" (App. D, p. 45a), but two others—the majority of the court of appeals' panel—instead resorted to a *per se* rule. The court of appeals' brief, cryptic *per curiam* opinion thus creates considerable uncertainty as to whether the existence of an "unreasonable risk" in Safety Act cases is a factual matter susceptible of trial, or a question to be resolved by judicial hunch and supposition without admission of evidence. Resolution of this recurring issue is of vital importance to the automotive industry, which is the largest manufacturing sector of the economy, and, of course, to the public safety.

The Statutory Scheme

The Act empowers the Administrator of the National Highway and Traffic Safety Administration ("NHTSA"), as the delegate of the Secretary of Transportation (49 C.F.R. § 1.51(a) (1977)), to direct the manufacturer of a motor vehicle to notify all purchasers of that vehicle model if, after an informal and expedited inquiry, the Administrator determines that the model "contains a defect which relates to motor vehicle safety." 15 U.S.C. § 1402(e) (1970) (amended 1974). The Administrator's investigation of any vehicle model he suspects may be hazardous is *ex parte*. If he initially determines that a vehicle contains a "defect" which "relates to motor vehicle safety," the Act requires that he notify the manufacturer of his findings and furnish all information on which his determination is based. The manufacturer then is afforded an opportunity to persuade the Administrator at an informal public meeting that the defect does not exist or is not safety-related, but the manufacturer is not afforded the rights of confrontation, cross-examination or other adjudicative due process rights at that meeting. If the Administrator adheres to his initial findings, he may direct the manufacturer to give notification of the defect to purchasers of the vehicle.

If the manufacturer fails to comply with the Administrator's directive, the United States may bring an enforcement action in federal district court seeking compliance with the order and a substantial civil penalty. Sections 109 and 110, 15 U.S.C. §§ 1398(a), 1399(a) (1970) (amended 1974). The enforcement proceeding involves a trial *de novo* of the factual questions surrounding the presence or absence of a safety-related defect. The government bears the burden of establishing at trial that the

alleged safety-related defect does in fact exist.[3] If the government prevails at trial, the manufacturer is required to notify the purchasers and is liable to assessment of the statutory penalty.[4]

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[3]In order "to expedite the disposition of safety-related defect and noncompliance matters without violating the constitutional rights of due process," Congress provided informal procedures at the defect notification stage with the understanding that due process would be satisfied by providing for "a trial *de novo* with the burden of proof on the Government to prove, by a preponderance of the evidence, that a safety-related defect . . . exists" before the manufacturer could be held liable. H.R. Rep. No. 93-1191, 93d Cong., 2d. Sess. 17 (1974); *see Ford Motor Co.* v. *Coleman*, 402 F. Supp. 475, 480 n.12 (D.D.C. 1975), *aff'd*, 425 U.S. 927 (1976); *United States* v. *General Motors Corp.*, 518 F.2d 420, 426 (D.C. Cir. 1975) (*"Wheels"*).

Congress adopted this approach in lieu of the procedure suggested by petitioner, and initially approved by the Senate in considering the 1974 Amendments, that a recall notification issue only after a formal administrative hearing based on the record, with cross-examination of witnesses on adjudicative facts, and with judicial review by the Court of Appeals for the District of Columbia Circuit on a substantial evidence basis. *See* H.R. Rep. No. 93-1452, 93d Cong., 2d Sess. 29, 32 (1974); H.R. Rep. No. 93-1191, *supra*, at 17; *cf. Hearing Before the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 92 (1973).

[4]The Administrator issued the instant directive in January 1974 pursuant to Section 113(e) of the Act. 15 U.S.C. § 1402(e) (1970) (amended 1974). The Act subsequently was amended on October 27, 1974. Pub. L. 93-492, 88 Stat. 1470. The major effects of the Amendments were: (1) to expand the remedy provision to require that the manufacturer not only notify, but also correct safety related defects without charge to the owners; (2) to require the manufacturer, should the Administrator so order, to send out provisional notice of the defect while the enforcement action is being litigated; and (3) to increase the maximum civil penalty from $400,000 to $800,000. Section 113 was repealed and replaced by essentially identical notification provisions (15 U.S.C. §§ 1411-1415 (Supp. V 1975)).

The 1974 Amendments do not apply to any notification required to be issued before their effective date, Pub. L. 93-492, Section 102(c), 88 Stat. 1477, and thus do not affect this litigation. While the Amendments changed the remedies associated with a safety related defect, they did not change the essential statutory provision that notification is required only of a "defect which relates to motor vehicle safety." Nor did they modify the definitions of "defect" and

The Act both grants authority for the issuance of recall directives and limits that authority. Thus, Section 113(e)(2), 15 U.S.C. § 1402(e)(2) (1970) (amended 1974), empowers NHTSA to issue notification directives, but only with respect to vehicles that contain "a defect which relates to motor vehicle safety." "Motor vehicle safety" is a defined term, and its definition expressly delimits the scope of the entire statute. S. Rep. No. 1301, 89th Cong., 2d Sess. 5 (1966); *see United States* v. *General Motors Corp.*, 518 F.2d 420, 435 (D.C. Cir. 1975) (*"Wheels"*). Section 102(1), 15 U.S.C. § 1391(1), provides that

> "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against *unreasonable risk of accidents* occurring as a result of the design, construction or performance of motor vehicles and is also protected against *unreasonable risk of death or injury to persons* in the event accidents do occur, and includes nonoperational safety of such vehicles. (Emphasis added.)

Thus, the Act does not require notification of every defect, but only of those which present "unreasonable risk" of accidents, injury or death.

The Proceedings Below

In 1972, NHTSA initiated an investigation of alleged failures of pitman arms in 1959-1960 model year Cadillac

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"motor vehicle safety" which are at issue in this case. *See United States* v. *General Motors Corp.*, *supra*, 518 F.2d at 436 & n.72. The court of appeals' decision on the standard of safety-relatedness therefore has full prospective application (App. A, p. 6a n.7). Accordingly, the 1974 Amendments of the statute provide no basis for denying certiorari in this case.

automobiles manufactured by petitioner. The pitman arm is an essential element of the automobile steering system. It transfers the angular motion of the steering wheel and shaft to the lateral movement of the steering linkage which turns the front wheels. If it fails, the vehicle cannot be steered.

On the basis of its investigation, NHTSA in September 1973 advised petitioner of its initial determination that these 1959 and 1960 Cadillacs contained a safety-related defect. The advice was contained in a letter which did not specify the defect but which furnished GM with a copy of the investigative report. On November 6, 1973, NHTSA conducted an informal meeting at which petitioner disputed the validity of the contents and conclusions of NHTSA's investigative report and argued that the pitman arm did not present an unreasonable risk of injury or accidents.

By letter dated January 10, 1974, the Administrator notified petitioner of his final determination that the pitman arm problem constituted a safety related defect and directed petitioner to furnish the notice specified by the statute to the purchasers of these automobiles (App. A, pp. 5a-6a; App. D, p. 40a). Petitioner disagreed with that determination and promptly sought judicial review of the recall directive.[5]

On February 13, 1974, the United States filed suit in the United States District Court for the District of Columbia seeking to enforce NHTSA's order under Section 110(a) of the Act, 15 U.S.C. § 1399(a) (1970) (amended 1974), and to collect the maximum civil penalty provided under Section 108(a), 15 U.S.C. 1397(a) (1970)

[5]Petitioner filed suit in the United States District Court for the Eastern District of Michigan seeking a declaration that NHTSA's determination was unlawful and an injunction against enforcement of its order. That action subsequently was transferred to the District of Columbia and consolidated with the government's enforcement action (App. D, p. 40a; App. E, p. 52a & n.10).

(amended 1974). Both parties moved for summary judgment. Following the standards adopted in *Wheels, supra,* the court granted the government's motion for summary judgment on the issue of the existence of a "defect" within the meaning of Section 102(11), 15 U.S.C. § 1391(11) (App. D, pp. 40a-42a; App. E, p. 49a).[6]

On the issue of whether the pitman arm defect was "safety-related" within the meaning of Section 102(1), the district court found that there was a disputed issue of material fact which required denial of both motions for summary judgment. Relying solely on the administrative record, which had not been tested in an adversary "due process" hearing before the agency, the government had contended that pitman arm failure could occur at high speed and constituted an unreasonable risk at any speed. Petitioner had countered with evidence and affidavits showing that pitman arm failure could occur only when the wheels were turned to or nearly to their extreme limits, a condition reached only in parking or turning at very slow speeds, when loss of directional control can be checked by braking, or when the automobile is standing virtually still (App. D, p. 43a). GM also argued that the operational history of these 15-year-old Cadillacs—some 24 billion miles of travel with "no documented injury or death resulting from pitman arm failure, as NHTSA has admitted"—demonstrated the absence of unreasonable risk (App. E, p. 56a: *see* App. D, p. 43a).

The district court observed that "[t]here is a certain appeal to the government's argument that a defect which may result in a loss of steering control is, *ipso facto,* a safety-related defect under the Act" (App. D, p. 45a).

[6]Petitioner did not challenge this ruling on appeal (App. A, p. 8a). Therefore, this issue is not presented to the Court for review.

However, the court found that the statute required rejection of any such *a priori* postulation:

> The Act is more limited, however. Under its standard, a safety-related defect must pose, not just a risk of accidents, death or injury, but an ***unreasonable*** risk. The inclusion of the adjective "unreasonable," as well as the legislative history make the question of whether fatigue induced failure of the pitman arm creates such an unreasonable risk a matter of fact, not of supposition (App. D, p. 45a) (footnote omitted).

Faced with conflicting factual submissions on the existence and degree of risk to the public, the court held that the reasonableness question could be resolved only by a *de novo* trial and denied the cross-motions for summary judgment (*id.*, pp. 45a-46a).

In the ensuing non-jury trial, the government attempted to prove through the testimony of an expert metallurgical witness that pitman arm failure could occur at high speed. It also introduced testimony purporting to describe a pitman arm failure which had occurred in circumstances other than in parking maneuvers or in a low-speed U-turn (App. E, pp. 55a-56a & n.14). In response, petitioner adduced expert metallurgical and engineering testimony to show that pitman arm failure could occur only during low-speed maneuvers or while the vehicle is stationary. Petitioner also introduced a risk analysis to quantify the projected future safety record of the Cadillacs, which, at that time, had completed approximately 96% of their useful lives. On the basis of past experience of billions of miles traveled, and on the basis of the engineering and metallurgical evidence concerning the nature of pitman arm failure, GM's expert calculated that there was "a negligible risk of accidents, injuries or death due to pitman arm failure in the

extremely limited future that remain[ed] for those automobiles" (App. E, p. 57a).

After consideration of all the evidence, the court found that the government's evidence of one pitman arm failure in conditions other than parking or very slow turns did not prove that such failures "would happen sufficiently often to create an unreasonable risk to safety" (*id.*, p. 57a). It therefore held that the government had failed to demonstrate that the pitman arm defect was safety-related and set aside the defect notification order (*id.*, pp. 57a-58a).

The court of appeals, with one judge dissenting, reversed. In a one paragraph *per curiam* opinion, the majority held that the district court should have granted summary judgment for the government, without receiving evidence beyond the untested administrative record, on the issue of whether the pitman arm defect "related to motor vehicle safety" (App. A, p. 2a). The majority considered only that the case involved a steering defect. It held that three facts—that six times as many replacement parts had been sold for these Cadillacs as for vehicles of adjacent model years; that pitman arm failures had occurred while these Cadillacs were being driven; and that their failure led to loss of directional control of the car—were sufficient without more to demonstrate conclusively an "unreasonable risk of accidents" as required by Section 102(1) (*id.*, p. 2a). The majority did not address any of the evidence received at trial. It simply announced a *per se* rule, reversed the judgment of the district court, and remanded for determination of the appropriate civil penalty (*id.*).

Judge Leventhal wrote a lengthy dissenting opinion out of concern for the precedential effect of "the doctrine we establish for governance of this type of case in the future

. . ." (App. A, p. 34a).[7] While recognizing that proof of a defect in steering might make out a *prima facie* case that such a defect was safety-related, Judge Leventhal rejected the majority's *per se* rule that any defect in the steering system *ipso facto* presented an "unreasonable risk" of accidents. Under his analysis, the critical flaw in the majority's reasoning was the

> [elevation of] facts which give rise to a strong suspicion of dangerousness into a conclusive presumption of the existence of a safety-related defect (*id.*, p. 34a).

Judge Leventhal found that by the inclusion of the term "unreasonable risk" in Section 102(1), Congress intended to require a factual balancing of the safety benefits to be obtained from, and the costs of compliance with, each particular recall order. He found that this provision required that the manufacturer be permitted "the opportunity to dispel . . . justified apprehension by proof that failure due to the defect does not occur in a dangerous fashion and that the risk arising from the defect is therefore inconsequential" (App. A, p. 34a). He concluded that "GM should have the opportunity to show that the failures occur in circumstances in which loss of steering is not dangerous" through proof of "a valid prediction of negligible future risk from operation of the cars based on a significant data base" accumulated during a substantial period of automobile operation (App. A, pp. 15a, 17a).[8]

[7]Judge Leventhal enjoys a special familiarity with the statutory scheme by virtue of having authored the two major opinions which have interpreted the Act, *Ford Motor Co.* v. *Coleman*, which was summarily affirmed by this Court, 425 U.S. 927 (1976), and *Wheels, supra.*

[8]Judge Leventhal styled his decision a partial dissent because he also disagreed with the district court's allocation of the burden of proof once the government had established a *prima facie* case (*id.*, pp. 21a-23a, 32a). He therefore would have reversed and remanded the case for retrial under what he deemed the proper standard of proof.

REASONS FOR GRANTING THE WRIT

In a decision of first impression, the court of appeals has departed fundamentally from the principles Congress intended to be utilized to determine whether a vehicle model should be recalled. And, by adopting a *per se* rule that precludes a manufacturer from introducing evidence bearing on the presence or absence of an "unreasonable risk," the court below has frustrated the manufacturer's ability meaningfully to exercise its right to challenge the informal administrative determination of a "safety related" defect. The result is not merely error in this case, but also considerable uncertainty about the scope of the substantive obligations of automobile manufacturers to recall and repair defective motor vehicles under the National Traffic and Motor Vehicle Safety Act. Clarification of the scope of the Act is a matter of obvious significance, both to the public and to the automotive industry.

Furthermore, the decision below is of especial significance in the administration of this important federal statute because enforcement litigation under the Act is concentrated in the District of Columbia Circuit. This is an archetypical instance in which certiorari should be granted because the court of appeals has erroneously decided an important question of federal law which has not been, but should be, decided by this Court.

1. Section 102(1) of the Safety Act empowers NHTSA to issue recall directives, not for all vehicle defects, but only for those defects which pose an "unreasonable risk" of accidents, injury or death. The legislative history of the Act demonstrates that Congress deliberately placed this

restriction on its scope in the recognition that imposition of any more stringent standard on manufacturers would require such enormous outlays for design, manufacture and testing as to price the automobile outside the means of the average consumer (*see* App. A, p. 14a). Selection of the "unreasonable risk" standard also reflects Congress' intention that recall orders would be issued only if found warranted after a balancing of safety considerations and the costs of compliance involved in each particular fact situation. *Wheels, supra,* 518 F.2d at 435; App. A, p. 12a; *see* S. Rep. No. 1301, *supra,* at 6; *Traffic Safety: Hearings on S. 3005 before the Senate Comm. on Commerce,* 89th Cong., 2d Sess. 56, 411 (1966).[9] Inherent in this balancing process is consideration of the various relevant factors, including the remaining useful life of the vehicle model and the expected severity of any accidents which might be caused by an unremedied defect, discounted by the improbability of their occurrence. *Cf. United States* v. *Carroll Towing Co.,* 159 F.2d 169 (2d Cir. 1947) (L. Hand, J.).

As the dissent below noted, however, the majority of the court of appeals in this case has read the reasonableness standard and the balancing test completely out of the statute. Rather, by adopting a *per se* approach, the majority ruled that evidence of the existence and degree of risk involved with this vehicle model never should have been received at all, let alone subjected to a balancing process.

The obligation of the district court in Safety Act cases is to conduct a *de novo* trial of the reasonableness question, taking into account the various considerations noted above. Here the district court conscientiously carried out that

[9]"Assessment of risk is a normal part of judicial and administrative fact-finding" and "must depend upon the facts of each case." *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F.2d 1, 18 & n.32, 28 n.52 (D.C. Cir.) (*en banc*), *cert. denied,* 426 U.S. 941 (1976).

duty, but the court of appeals nullified the trial court's effort by substituting its own notion of a *per se* rule for the trial court's careful and reasoned findings and conclusions. The appellate court's *per se* rule is illogical and unsupportable under this court's guidelines for the adoption of irrebuttable presumptions.[10] Its decision also manifestly contravenes the explicit intention of Congress in adopting the Safety Act, which was to protect, not against all risks, but only against "unreasonable" risks.

2. The fact that this is a case of first impression should in no way inhibit the Court from granting certiorari. Indeed, for at least two reasons, this case is unusually worthy of review precisely because it is a case of first impression. First, because enforcement litigation under the Act is concentrated in the District of Columbia Circuit, *see* pp. 18-19, *infra,* the decision below will be followed to some degree in all subsequent Safety Act litigation. The majority's determination to announce only an unexplained result, instead of articulating meaningful standards to guide the district courts in other cases, is particularly unfortunate, and will confuse and inject error into the future administration of the Act unless the errors below are corrected. Second, this

[10]The majority's implicit adoption of a *per se* rule that all disabling steering defects amount to unreasonable risks under the Act was improper for reasons wholly apart from the incompatability of such a rule with the legislative intent behind the "unreasonable risk" test. This was the very first case to reach trial on the issue of the presence or absence of an unreasonable risk on specific facts. *Per se* rules, which permit a proposition to be established without evidentiary proof, can be justified only on the basis of extensive "experience and analysis." *White Motor Co.* v. *United States,* 372 U.S. 253, 265 (1963) (Brennan, J., concurring). Only rarely will practical experience be sufficient to permit conclusions about reasonableness to be drawn without evidence and trial. Indeed, rules or statutes based on irrebuttable assumptions, which operate precisely like *per se* rules, can raise significant constitutional problems. *See, e.g., Cleveland Board of Education* v. *Lafleur,* 414 U.S. 632 (1974); *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

case presents a complete factual record upon which an appellate court can review the balancing of competing considerations required by the Act. If the majority's *per se* approach is permitted to stand and is extended to other components of the automobile, as the government has already suggested in another pending Safety Act case,[11] the appellate record in subsequent cases will not be developed beyond what is accumulated in the informal agency proceeding. Accordingly, this is likely to be the case with the most developed record upon which to consider the meaning of "unreasonable risk."

3. The majority's holding that the government should have been granted summary judgment on the basis of material gathered in NHTSA's administrative investigation also raises significant due process problems. Section 109 of the Act, 15 U.S.C. § 1398, exposes a manufacturer to a civil penalty of up to $800,000 if it disagrees with NHTSA's recall order and forces the government to seek its enforcement in district court. Section 155(c)(1), 15 U.S.C. § 1415(c) (1) (Supp. V 1975), also provides that a manufacturer may obtain a preliminary injunction against enforcement of that order, and thereby stay the accrual of the civil penalty, upon proof that its failure to notify owners was reasonable and that it is likely to prevail on the merits at trial. In *Ford Motor Co.* v. *Coleman, supra,* the three-judge district court determined that the civil penalty provisions were constitutional, but only because a manufacturer with a substantial, nonfrivolous challenge to the Administrator's order could obtain a preliminary injunction which would toll the assessment of the penalty while it litigated the validity of the order in the district court.

[11] *See* Memorandum in Support of the Motion of the Federal Appellees for Summary Affirmance in *United States* v. *General Motors Corp.*, C.A. D.C., Nos. 76-1744 and 76-1745, on appeal from the decision in *United States* v. *General Motors Corp.*, 417 F. Supp. 933 (D.D.C. 1976) (the *Quadrajet* case).

The decision below will exacerbate the burdens, identified in *Coleman,* that the statute imposes on the manufacturer at the preliminary injunction stage. The majority's *per se* rule will be read back into the requirement that the manufacturer demonstrate a likelihood that he will prevail on the merits. Thus, in entire categories of cases in which the manufacturer believes in good faith that the recall order is not justified because of the absence of documented past or predicted future accidents, he will be unable to toll the imposition of penalties unless he can prove at the preliminary stage, not only that the evidence is at least in equipoise, 402 F. Supp. at 487, but also that the allegedly defective component is not subject to an existing *per se* rule and that a new irrebuttable presumption should not be extended to that component.

The ruling below thus greatly increases the threshold showing required of the manufacturer, especially in light of the majority's failure to articulate meaningful standards as to when such *per se* rules are appropriate. It vitiates the adequacy of the protection otherwise afforded by Section 155(c) by denying the manufacturer an effective opportunity to litigate, without exposure to substantial civil penalties, the validity of an *ex parte* administrative order it believes in good faith to be erroneous.[12] It is precisely this type of barrier to litigation that the Due Process Clause prohibits. *See, e.g., St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), *aff'g* 285 F.2d 607 (2d Cir. 1960); *St. Louis, Iron Mountain & Southern Ry.* v. *Williams,* 251 U.S. 63, 64-65 (1919); *Wadley Southern Ry.* v. *Georgia,* 235 U.S. 651 (1915).

[12] It is the government's policy to seek assessment of the maximum penalty in every enforcement action. *Amendments to the National Highway Traffic Safety Act of 1966: Hearings on H.R. 7505, H.R. 5529, H.R. 4187, and S. 355 before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce (Part 1),* 93d Cong., 1st Sess. 388 (1973).

Rather than casting the constitutionality of a portion of the Act in doubt by permitting the decision below to stand, the Court should grant certiorari to review the purported statutory basis for that decision.

4. The issue presented by this petition is fully ripe for decision by this Court. Not only does the case come to this Court on a fully developed trial record, as discussed above, but, for reasons we shall now briefly set forth, a conflict among the courts of appeals is highly unlikely to arise in the future.

Section 155(a) of the current Act, 15 U.S.C. § 1415(a) (Supp. V 1975), provides that a government enforcement action or any other action with respect to a NHTSA notification and remedy order may be brought only in the United States District Court for the District of Columbia or for a judicial district in the state of incorporation of the manufacturer. To date, the government has followed a *de facto* policy of filing all its enforcement actions against auto manufacturers in the District of Columbia.[13] Moreover, even when manufacturers have attempted to litigate the validity of a notification order in another district, by bringing an injunctive action before the government filed its enforcement suit, those actions have either been dismissed or transferred to the District of Columbia once the government action has been filed.[14]

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[13]For example, all the outstanding enforcement actions listed in NHTSA's Annual Report for 1976 were pending in the United States District Court for the District of Columbia. Department of Transportation, NHTSA, *Traffic Safety '76*, at F-3 to F-4 (1977).

[14]*See, e.g., General Motors Corp.* v. *Volpe*, 457 F.2d 922 (3d Cir. 1972), *aff'g* 321 F. Supp. 1112 (D. Del. 1970), dismissing the manufacturer's pre-enforcement review action on the ground that the government's enforcement action in the District of Columbia provided an adequate opportunity for review of all claims under the Act. Indeed, in the instant case, petitioner's pre-enforcement action was transferred to the District of Columbia and consolidated with the government's subsequent enforcement action. See p. 8 & n.5, *supra*.

Section 155(a) now requires the consolidation of "all actions (including enforcement actions)" brought with respect to a single notification order in accordance with the order of the court in which the first such action is brought. The lower courts have adopted the position that all such cases should be consolidated in the district court in which the government filed its timely enforcement suit, regardless of the order in which the suits were filed. *See Ford Motor Co.* v. *Coleman, supra*, 402 F. Supp. at 486 & n.30.

Under other circumstances, the interest of economy in the exercise of the Court's discretionary jurisdiction might suggest that the grant of certiorari be withheld until a conflict in statutory interpretation actually developed. Because of the high probability that all future litigation under the Act will be concentrated in the District of Columbia Circuit, however, the absence of an outstanding conflict among the courts of appeals should not persuade the Court to delay consideration of this pressing issue. *See, e.g., Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50 (1938).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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October 6, 1977

Appendices

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1751

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL MOTORS CORPORATION, a Corporation

No. 75-1752

GENERAL MOTORS CORPORATION, a Delaware Corporation

v.

BROCK ADAMS *et al.*, APPELLANTS

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Actions Nos. 74-277 & 74-1053)

Argued September 23, 1976

Decided June 28, 1977

Neil H. Koslowe, Attorney, Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney, and *William Kanter*, Attorney, Department of Justice, were on the brief, for appellants. *Morton Hollander*, Attorney, Department of Justice, also entered an appearance for appellants.

James Robertson, with whom *Michael L. Burack*, *Cornelius J. Golden, Jr.*, and *Frazer F. Hilder* were on the brief, for appellee.

Before WRIGHT, LEVENTHAL, and ROBB, *Circuit Judges*.

Opinion for the court *per curiam*.

Opinion dissenting in part filed by *Circuit Judge* LEVENTHAL.

PER CURIAM: The facts and circumstances surrounding this case are fully stated in the dissent. While the court agrees with much of Judge Leventhal's scholarly opinion, we believe that the Government's motion for summary judgment should have been granted by the District Court, not only on the issue whether a defect existed in the steering pitman arm of the 1959-60 model Cadillac automobiles, but also on the issue whether the defect was related to motor vehicle safety. The evidence is uncontradicted that General Motors sold six times as many pitman arm replacement for the 1959-60 Cadillac models as for adjacent model years; that steering pitman arm failures have occurred while these models were being driven; and that when the steering pitman arm fails, the driver loses control of the car. We hold that, under the statute, these uncontradicted facts demonstrate an "unreasonable risk of accidents" stemming from the defect. 15 U.S.C. § 1391(1) (1970).

The judgment of the District Court is reversed and these cases are remanded for determination of appropriate relief.

So ordered.

LEVENTHAL, *Circuit Judge, dissenting in part:* In the principal case before us, the government seeks enforcement against General Motors of a defect notification order, as well as fines. The district court denied summary judgment to the government. After trial, it held for General Motors.

The majority concludes that the Government should have been given a summary judgment, and remands for determination of appropriate relief.

I concur in the view that the district court judgment in favor of General Motors cannot stand. In my view, however, the case is one that is not appropriate for summary judgment and requires a retrial in accordance with what I consider to be sound principles. These principles are to some extent set forth in our prior opinion in the *Wheels* case. *United States v. General Motors Corp.*, 171 U.S.App.D.C. 27, 518 F.2d 420 (1975) [*Wheels*]. I think it would be most convenient if I proceed at this point as if I were writing an opinion for the court—presenting what I would consider the correct disposition.

This case concerns the standard for proving that a defect in an automobile model "relates to motor vehicle safety" within the meaning of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (the Act). The National Highway Traffic Safety Administration (the Administration) ordered General Motors (GM) to issue defect notifications [1] concerning the pitman arms of 1959 and 1960 Cadillacs, which break as a result of steering stress, causing sudden loss of steering control. An action seeking enforcement of this order was tried de novo [2] in the district court with the trial judge as the finder of fact.

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[1] *See* note 7, *infra*.

[2] Jurisdiction over this enforcement action is based on 15 U.S.C. 1399(a). *See* note 7, *infra*.

The existence of a defect was conceded. GM offered proof that the pitman arm failures occur only in high stress situations, which involve low speed and parking maneuvers. The government introduced evidence of at least one incident in which pitman arm failure at lesser steering stress produced a dangerous situation as well as expert testimony on normal human reaction to loss of steering at low speed. GM presented a "risk analysis" which predicts the likely number of future injuries or deaths to be expected in the remaining service life of the affected models.

The district court found that GM had successfully rebutted the government's "slim *prima facie* case" on the basis of the risk analysis. In so deciding, the district court applied an incorrect legal standard as to the burden of presenting data of past harm caused by the defect. The correct standard leads to the conclusion that it was "clearly erroneous" for the district court to find that GM met its burden of rebutting the government's prima facie case.

I. Background

A. *Administrative Action*

In 1972, acting on consumer complaints brought to its attention by the Center for Auto Safety, the Administration began an investigation of pitman arms failures in 1959-60 Cadillacs. The pitman arm is a critical component of the steering system. It transfers the angular motion of the steering wheel and shaft to lateral movement of the drag link and tie rods which turn the front wheels. When the pitman arm fails, steering control is suddenly lost. In September, 1972, the Administration requested information from Cadillac's manufacturer, GM, about the pitman arm. GM's summary of its investigation stated that, as of September 1972, it had sold approximately six times as many replacement pitman arms

for the 1959-60 models as for the adjacent years' models.[3] Furthermore, the GM presentation showed that 1959-60 pitman arm design was quite different from that of those models and that on June 10, 1960, GM changed the hardness specification for the 1959-60 pitman arm "after end of regular production on service replacement parts," "to improve performance" under extreme loads.[4]

During 1973, the Administration reviewed the material presented by GM and customer complaints, contracted for testing of pitman arms,[5] and conducted hearings in which GM participated. On January 10, 1974, the Administrator notified GM that he had "determined that a defect which relates to motor vehicle safety exists with respect to the steering pitman arm on 1959-60 model year Cadillac automobiles, in that these pitman arms are subject to sudden, and catastrophic failure, causing loss of steering control, and resulting in an unreasonable risk of accidents, deaths, and injuries to persons using the highways".[6] The Administration directed GM to notify own-

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[3] The figures for the numbers of replacement pitman arms sold are:

Model years	Pitman arms sold
1957-58	4,519
1959-60	26,424
1961-62	4,423

Summary of General Motors review with the National Highway Traffic Safety Administration Friday, September 29, 1972 at fig. 11, Government exhibit 4, tab 2.

[4] *Id.* at fig. 21.

[5] The phrase "pitman arms" is used hereafter to mean pitman arms installed in 1959 and 1960 Cadillacs.

[6] Letter from James B. Gregory, Administrator of the National Highway Traffic Safety Administration to E. N. Cole, President of GM at 2, Government exhibit 3, tab 34.

ers of the affected Cadillacs of the defects and urged GM to recall them for replacement at GM's expense.[7]

B. *Enforcement Action*

1. *Preliminary Matters*

On January 11, 1974, GM filed suit in the District Court for the Eastern District of Michigan to set aside the Administration order.[8] A temporary restraining order (TRO) against the effectuation of the January 10 order was granted on the same day, but after a hearing the TRO was vacated and a preliminary injunction denied.[9] That same day, Feb. 13, 1974, the government commenced an enforcement action in the District Court for the District of Columbia.[10] In addition to enforce-

[7] This order was issued by authority of 15 U.S.C. 1402(e) (1970). The Act was amended on Oct. 27, 1974 by Pub. L. 93-492. The defect notification provision, § 1402, was repealed and replaced by 15 U.S.C. §§ 1411-1420. Enforcement of notification order is governed by § 1415. The new provisions require the manufacturer to remedy the defect without charge, 15 U.S.C. § 1414(a).

The 1974 amendments do not apply to the present case since the notification was required to be issued "before the effective date" of the amendments. Pub. L. 93-492, § 102(c), 88 Stat. 1477. However, while the 1974 amendments changed the procedures and remedies associated with a safety related defect, they did not change the definitions of "defect" and "relate[d] to motor vehicle safety" which are at issue in this case. Therefore, these views on the standard and burden of proof of safety-relatedness have full prospective application.

See United States v. General Motors Corp., 171 U.S.App. D.C. 27, 43 & n. 72, 518 F.2d 420, 436 & n. 72 (1975) [hereinafter cited as *Wheels*].

[8] General Motors Corp. v. Brinegar, Civ. No. 4-70939 (E.D. Mich.).

[9] *Id.*, Order Denying Motion for Preliminary Injunction, (Feb. 13, 1974), J.A. 26.

[10] United States v. General Motors Corp., Civ. No. 74-277 (D.D.C.) [hereinafter cited as *Pitman Arm*].

ment of its notification order, the government sought imposition of a $400,000 civil penalty, pursuant to § 109(a) of the Act.[11]

Both parties sought a change of venue of the other's case to their chosen forum. The parties and judges recognized that the interests of justice and convenience of all called for consolidation of the cases raising identical issues. In a joint order of July 8, 1974, the district courts ordered the cases consolidated in the District of Columbia.[12]

2. *Denial of summary judgment*

Both parties moved for summary judgment under Fed. R.Civ.P. 56(c). An action for enforcement of a notification order, under § 110(a), 15 U.S.C. § 1399(a), is tried de novo in the district court.[13] The government has the burden of proof on the two elements required by the Act: 1) that a "defect" exists and 2) that the defect is "related to motor vehicle safety," *i.e.* involves an "unreasonable risk of accidents occurring as a result of the design, construction, or performance of motor vehicles . . . ." [14]

[11] 15 U.S.C. § 1398(a) (1970). The 1974 amendments raised the maximum penalty to $800,000, 15 U.S.C. § 1398(a). *See* note 7, *supra* and note 64, *infra*.

[12] Order in General Motors Corp. v. Brinegar, Civ. No. 4-70939 (E.D. Mich. July 8, 1974) and *Pitman Arm* (D.D.C. July 8, 1974), J.A. 44-46. The order was based on the ability of Judge Gasch to deal with the cases substantially earlier.

[13] *Wheels*, *supra* 171 U.S.App.D.C. at 45, 518 F.2d at 438. *See also* § 10(e)(2)(F) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(F).

[14] The Act defines:

> "Defect" includes any defect in performance, construction, components, or materials in motor vehicles or motor vehicle equipment.

[Continued]

The district court effectively granted summary judgment in favor of the government on the issue of existence of a defect. It based that judgment on 1) the disproportionately high replacement pitman arm sales, in the absence of any serious contention that this was due to causes other than a disproporationately high rate of pitman arm failures, and 2) tests performed by both parties showing that "the pitman arm can fail from metal fatigue after a large number of high stress maneuvers such as occur in parking and turning." [15] On appeal, GM does not challenge this determination.

On the issue of safety-relatedness, the district court denied summary judgment to both sides. It acknowledged that:

> [t]here is a certain appeal to the government's argument that a defect which may result in a loss of steering control is, *ipso facto*, a safety-related defect under the Act. One need only ask whether he would consider loss of steering control even at a very slow speed, a reasonable or unreasonable risk.[16]

However, GM contended that the pitman arm failures could only occur in low-speed, high-stress maneuvers and that the absence of reported instances of death or injury resulting from pitman arm failure in the long history

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[14] [Continued]

15 U.S.C. § 1391(11) and

> "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

15 U.S.C. § 1391(1).

[15] *Pitman Arm*, 65 F.R.D. 115, 117-18 (D.D.C. 1974).

[16] *Id.* at 119.

of the affected cars showed an absence of "unreasonable risk." The district court stressed the standard of an *unreasonable* risk and the "commonsense" approach to safety questions under the Act.[17] It concluded:

> This is an issue af fact which cannot be resolved by logic alone. And it is an issue of material fact under the law of summary judgment.[18]

3. *The trial*

A non-jury trial of the issue of the safety-relatedness of the pitman arm defect was held from February 3 through February 11, 1975. Both sides presented metallurgical expert testimony on the process of fatigue-induced failure in pitman arms and the circumstances in which pitman arm separation could occur. The government presented the testimony of a driver, Karen Arbuckle, who had recently experienced a loss of steering during a 90° turn at 10-15 mph due to pitman arm failure in her 1969 Cadillac.[19] In the incident, no one was injured. The government also presented the testimony

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[17] *See Wheels, supra*, 171 U.S.App.D.C. at 42-43, 518 F.2d at 435-36.

[18] *Pitman Arm, supra*, 65 F.R.D. at 120.

[19] The district court summarized the evidence on this incident thusly:

> The US also offered the experience evidence of Mrs. Karen Arbuckle of Des Moines, Iowa. Mrs. Arbuckle testified that on November 7, 1974, the steering on her 1960 Cadillac failed without warning as she was making a right hand turn, and her vehicle proceeded diagonally into the curb on the opposite side of the street into which she was turning. Fortunately the oncoming traffic lane was empty so there was no collision. An examination of the steering system revealed a separation of the pitman arm resulting from fatigue-induced failure. Mrs. Arbuckle estimated that she was traveling between ten and fifteen miles per hour at the time she experienced loss of directional control.

of a professional driver and two experts in human reactions on the danger of sudden loss of steering, even in low speed maneuvers. One of the latter experts, Duncan Miller, testified that the median time between pitman arm failure in 5 mph U-turn and commencement of braking "would be in excess of 1.6 second." [20] Raymond Caldwell, the professional driver, testified from tests with an artificially separable pitman arm that the car entered the opposing lane of traffic 1⅛ seconds after separation in a 5 mph 90° turn, and ⅔ of a second in a 10 mph U-turn.[21]

In rebuttal, GM offered further evidence, a "risk analysis" by one of its experts in fracture mechanics, Dr. Alan Tetelman.[22] From this analysis, based on data in GM's files on pitman arm failures and general accident data, Dr. Tetelman predicted that for all the approximately 40,000 affected Cadillacs still on the road, during their remaining service life, there would be a very small chance (less than 1%) of a fatality. His analysis projected only one incapacitating and one non-incapacitating injury. The government objected to the data used by Dr. Tetelman and called a statistical expert to criticize his methodology and the significance of his result.

On April 25, 1975, the district court filed its findings of fact and conclusions of law in these cases. The court found that the government had:

> made out a slim *prima facie* case on the testimony of Mrs. Karen Arbuckle concerning a recent pitman arm failure in her 1960 Cadillac and the metalurgical and metal fatigue tests and testimony of Dr. Volker Weiss. GM countered with the risk analysis and fracture mechanics tests and testimony of Dr. Alan Tetelman. Since the government as plaintiff

[20] Trial transcript [hereinafter cited as Tr.] 342, J.A. 224.

[21] Tr. 281-82, J.A. 186-87.

[22] *See* section IV.A, *infra*.

> did not bear its burden of proof, the Court finds that the pitman arm defect in model year 1959-60 Cadillacs does not create an *unreasonabe* risk of accidents, injuries or death, and concludes that General Motors need not issue a defect notification to owners of those automobiles.[23]

On April 28, 1975, the district court entered an order that set aside the Administrator's order to GM to issue defective notices and dismissed the cases.[24]

II. The Statute

A. *Safety Related Standard*

This case presents issues of the Act's defect notification provisions not resolved in *Wheels*, 171 U.S.App.D.C. 27, 518 F.2d 420 (1975).

Wheels involved the standard of proof of a "defect" in a type of pickup truck wheel; the defect, if established, undisputedly related to safety. Here, a defect in the pitman arm is conceded. The issue is safety-relatedness, the standard for determining whether the defect is "related to motor vehicle safety." *Wheels* came to us on summary judgment, whereas the case at bar was tried to the court, after summary judgment was properly denied, and the issue is whether the district court applied the correct standard on the burden of proof. In spite of these differences, both cases require examination of a provision employed by Congress to enhance safety in connection with automobiles. *Wheels* provides guidance in elucidating the standard of proof for requiring a defect notification.[25]

[23] *Pitman Arm, supra*, Memorandum at 3-4 (Apr. 25, 1975), J.A. at 699-700.

[24] *Pitman Arm, supra*, Order (Apr. 28, 1975), J.A. 711.

[25] *Wheels, supra*, 171 U.S.App.D.C. at 39-44, 518 F.2d at 432-37.

The key concept in the statutory scheme is that of "unreasonable risk of accidents." As we concluded by examination of the legislative history in *Wheels*, this concept is to be applied in a "commonsense" manner, balancing safety benefits against economic costs.[26]

Section 1 of the Act states its overall purpose:

> Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents.[27]

This broad purpose is reflected in the central provision relating to this case which contains this definition in § 102(1):

> (1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.[28]

It may be noted that the statutory language relates to protection against an unreasonable risk of "accidents," and separately to protection against "unreasonable risk of death or injury" in the event an accident occurs.

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[26] *Id.* at 40-41, 518 F.2d at 433-34. Only a fraction of the affected Cadillacs are still on the road. In this respect the cost of precautionary repair and the risk thereby averted are diminished proportionately. If, as appears from the record, the cost of replacing the pitman arm is relatively modest, it may well be that the administrative expense in ascertaining and notifying the owners of 1959-60 Cadillacs still in use may be significant in comparison to the replacement costs.

[27] 15 U.S.C. § 1381.

[28] 15 U.S.C. § 1391(1).

Senator Mondale, the author of the defect notification amendment in the Senate bill, stated in debate:

> I do not consider it necessary to speculate whether a wheel falling off without warning is a safety hazard. Obviously, it is . . . . It is my view that the fair-warning provision is essential to make sure that the automobile consumer is warned of hazards such as this.
>
> It is only fair, in view of the vast organizations established for the sale and service of these automobiles to notify the owner in clear and unmistakable terms, once a safety defect is known that a safety hazard is involved, what it is, and what corrective steps can be taken.[29]

The House Report on the defect notification section states:

> This section was included to afford a means for uniform and prompt notification to vehicle owners of the discovery of any defects related to safety. "Defect" is a defined term which includes any defect in performance, construction, components, or materials in motor vehicles or motor vehicle equipment. The provisions of this section do not alter other courses available to the Secretary, with respect to the deficiencies which necessitate notification, such as the imposition of a civil penalty or the seeking of injunctive relief. It is the committee's intention that the Secretary will exercise his authority under this section to publish notices and information concerning defects in those situations where so doing will bring about a *higher level of safety.* In this connection, the committee is confident that the manufacturers will be active in notifying purchasers and users so that defects will be corrected as quickly as possible.[30]

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[29] 122 Cong. Rec. 14247 (June 24, 1966).

[30] H.R. Rept. 89-1776 at 28 (1966) (emphasis added).

Out of any manufacturing process, some products are bound to be "lemons." These failures may be due to flaws in the design, construction (including occasional human error on the production line) or inspection process. When the defects are occasional or isolated, the risk associated with them is part of the ordinary danger of operating an automobile; minimizing them is one aspect of the quality of a manufacturer's product which consumers choose to pay for. Total elimination of this risk would require a standard of design, construction, and testing that would produce a purchase price so prohibitive that it cannot be taken as the contemplation of Congress. And that obtains even though such a defect may be in a vital component and result in a safety risk.

However, the matter stands quite differently where it appears that the defect is systematic and is prevalent in a particular class of cars. Such a defect may be identified by an unusually high rate of failures in actual operation or by tests showing that failure is likely under normally encountered circumstances.

In the event of a systematic defect, which leads to failures in a vital component, such as is the case with the pitman arms causing sudden loss of steering, this is prima facie an "unreasonable risk" for which Congress prescribed the additional protection (over and above a manufacturer's customary quality control) of notification, and now, recall.[31] Proof of the pitman arm defect, which leads to its failure and loss of steering under foreseeable driving conditions, creates a strong presumption that the defect "relates to motor vehicle safety." The presumption is rebuttable. The reasons for rejecting the government's contention that such a defect is per se related to safety are set out below. Certainly, however, if this case had arisen near the beginning of the cars' service life, when there was little real-life experience with the cars, such

[31] *See* note 7, *supra*.

proof would suffice to obtain enforcement of a notification order without waiting to see how many people would be hurt or killed.

With respect to 1959-60 Cadillacs, there was no prompt action in response to the pitman arm defect to notify owners or recall the car for repairs, nor has there been to date. Rather, during the period that has already elapsed —the bulk of the cars' service life—there have undoubtedly been many pitman arm failures; the safety consequences of those failures are unknown, unknown to the parties and to the courts.

During that period, GM, which knew early on of an unusual number of pitman arm failures,[32] had the opportunity to develop data concerning experiences with pitman arms, the universe of failures and consequences thereof. This it had the power to acquire, as a manufacturer, by suitable notice to and inquiry of its dealers and, untimately, it customers.

Instead, GM relies, in effect, on the lack of notifications sent to it on the initiative of consumers, *i.e.* on the dearth of complaints.

B. *Burden of Rebuttal*

The government's prima facie case is not a conclusive demonstration of a safety-related defect. GM should have the opportunity to show that the failures occur in circumstances in which loss of steering is not dangerous. In this case, GM maintains that the pitman arms fail only where the steering mechanism is subject to high stress, typically at low speeds and parking. GM further claims that loss of steering in such maneuvers is not dangerous. These contentions were supported by an offer of proof in

[32] *See* text at note 4, *supra*.

affidavit form, and so the district court properly denied the government's motion for summary judgment.[33]

GM offered two types of evidence in support of its two part contention which constitutes its rebuttal case. These two strands are discussed in Parts III & IV of this opinion in some detail, because they serve as models of types of evidence available to a manufacturer coping with the burden of rebuttal.

The first type of evidence was offered by GM in support of its contention that pitman arm failures occur essentially only under high stress. This evidence relates to the mechanism responsible for pitman arm failures. The evidence stems from tests on Cadillacs with the defective pitman arms and metallurgical interpretation of failed pitman arms. One point illustrated by this type of evidence is the possibility for a manufactuer to meet

[33] *See Wheels, supra,* 171 U.S.App.D.C. at 47-53, 518 F.2d at 440-46.

Summary judgment in favor of the government was granted in a case with some similarities to the present one, albeit one which manifested more dramatic indication of the defect. United States v. General Motors, 417 F. Supp. 933 (D.D.C. 1976) (*Quadrajet Carburetor*). There was extensive experience with the affected cars, the model involved having "used up" about 83% of its service life. The carburetor defect, which GM apparently acknowledged, caused the engine to fail and gasoline leakage, which led to the occurrence of at least 70-300 known fires in the engine compartment. The incidents presented were potentially very dangerous, but in fact resulted in only minor injuries. GM "asserted that the incidence of future plug failure would be negligible, and that based on a statistical prediction there will be less than one injury and no deaths as a result of the defect." *Id.* at 935. Since the record in that case is not before us, it is not possible to form any opinion whether GM's claim of a disputed material fact precluded summary judgment. The facts of the *Quadrajet Carburetor* case raise the possibility that the manifestation of the defect might be so obviously dangerous that summary judgment *might* be proper.

its burden of rebuttal, on at least a portion of the overall safety-related issue, entirely by experimental proof, *i.e.* testing and metallurgical analysis, without the necessity of offering experimental proof based on a survey of significant amounts of road experience.

Both parties offered experimental evidence of this first type. Both put on witnesses with expertise in metallurgy. The government also offered experts in drivers' reactions; the manufacturer's supplement to the metallurgical evidence was the risk analysis previously noted. Both. sides interlard their experts with projections on the ultimate issue of the magnitude of risk based on common sense.

As to driving expertise, central to Dr. Tetelman's risk analysis, the government relied on the Arbuckle incident [34] to verify that the risk of danger from pitman arm failure is not merely theoretical. There are situations, after all, in which even one instance verifies a general proposition.[35]

A manufacturer undertaking to rebut the government's prima facie case by an empirical showing based on experience accumulated during a substantial period of automobile operation must be able to make a valid prediction of negligible future risk from operation of the cars based on a significant data base. GM attempted to make this prediction for the 1959-1960 Cadillacs still in service through Dr. Tetelman's "risk analysis." The question is whether this analysis, essentially a statistical inference and prediction, rests on a data base adequate to carry the manufacture's burden of rebuttal.

[34] *See* note 19, *supra.*

[35] [I]t is enough to validate the principle of the electric light bulb if only one is seen at work.

International Harvester Co. v. Ruckelshaus, 155 U.S.App.D.C. 411, 443, 478 F.2d 615, 647 (1973).

There is no legal requirement at present on either the government or manufacturers to keep comprehensive data on automobile accidents, such as the Federal Aviation Administration maintains on commercial aviation. The store of recorded experience must nevertheless be significant if it is to serve as the foundation for empirical rebuttal by a manufacturer. This requirement is a simple matter of the reliability of the rebuttal proof. And there is justice in this allocation to the manufacturer of the burden of compiling significant data on the causes and consequences of mishaps in its cars. Manufacturers have the channels, through their dealers, and the business motivation of good will and customer satisfaction, to acquire and maintain significant data on performance.[36]

III. Issue of When Pitman Arm Failures Occur

A. *Evidence*

GM contends that pitman arm failures occur essentially only in high stress maneuvers. At trial, GM presented

[36] We have held that the burden is shifted where evidence pertinent to the issue is particularly within the knowledge of the defendant, International Harvester Co. v. Ruckelshaus, 155 U.S.App.D.C. 411, 439, 478 F.2d 615, 643 (1973). *Cf.* res ipsa loquitur cases concerning proof of negligence in which the burden is shifted to the defendant(s) due to his (their) greater access to the relevant evidence, *e.g.* Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944).

A final point is the interrelation of the manufacturer's burden of rebuttal of the government's prima facie case to the ultimate issue in this case—whether or not to require action in the interest of the public's safety. Justice Harlan explained the role of the standard (more generally, the burden) of proof in effectuating society's choice between the two types of potential error in a judgment:

> the choice of the standard for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.

In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

expert metallurgical evidence on the mechanism by which pitman arm failures occur. Dr. Kenneth Packer and Dr. Alan Tetelman testified that the fatigue-induced failure begins with a crack in the "necked down" portion of the arm, where the cross-section is smallest. The crack propagates as stress is applied in various steering maneuvers; the propagation rate increases with greater stress and size of existing crack(s). When a stress is applied which the intact area cannot sustain, the pitman arm fails. This process is called brittle fracture.

GM conducted tests to determine the stress felt by the pitman arm in various driving situations.[37] Both sides used these measurements in their analysis. The crucial point is that the load is highest in quasi-stationary (parking) and slow maneuvers, such as a 5 mph U-turn. The stress in these maneuvers is over 2000 pounds, while in maneuvers over 10 mph, even jolting ones, the stress is close to 1000 pounds or less.

GM's experts presented a theory of "proof testing" which indicates that pitman arm failures will occur only

[37]

Car Maneuver	Pitman Arm Load (lbs)
70 mph slow lane change	212
70 mph fast lane change	412
40 mph hard cornering	564
30 mph moderate S-turns	470
15 mph 90° turn	670
25 mph pothole	974
normal parking	2237
parking with manual effort (58 lbs rim pull)	2982
35 mph Belgian blocks	437
(55 mph) stops on chatter bumps	750
(45-55 mph) cornering on chatter bumps	1025
5 mph U-turns	2144
5 mph driveway maneuver	2330

N.L. Keller, Pitman Arm Load Determination in a 1960 Cadillac, Final Report at 63 (April 3, 1974), J.A. 632.

in the high stress, low speed maneuvers. In normal operation, the steering mechanism is involved in a series of high and low stress events. The high stress events "proof test" the pitman arm. If a crack is developing, the pitman arm will fail when a high stress is applied exceeding the strength of the remaining cross section. Dr. Tetelman testified that a Cadillac would have to encounter at least 4000 potholes or many turning maneuvers at moderate or high speed without ever parking to permit the crack to extend to the point where it could fail above low speed.[38] This theory was supported by GM's experts' inspection and interpretation of the fractured surface of several pitman arms which had been made to fail in tests. They testified that the intact area before the final failure was about half of the original cross-sectional area. This is consistent with their view that the pitman arms would tend to fail with a relatively large intact area, under the influence of a large stress.

The government's metallurgical expert, Dr. Volker Weiss, disagreed with GM's experts in both their view of the failure mechanism and interpretation of the failed pitman arm surfaces. Dr. Weiss disputed the applicability of "proof testing," based as it is on a brittle fracture process. He testified that pitman arms can deform plastically at high stress; this means, apparently, that with a certain application of high stress, a pitman arm can be seriously weakened, but not fail until application of the final blow at moderately low stress. He interpreted GM's test-failed pitman arm [39] as having an intact cross section just prior to separation only a fraction (less than one-fifth) of the 50% figure testified to by Dr. Packer.[40] Dr. Weiss gauged this previously intact area to have been

[38] Tr. 702-705C, J.A. 347-53.

[39] GM Exhibits 12 & 15, J.A. 645-46.

[40] *Compare* Dr. Weiss's testimony, Tr. 461-65, J.A. 265-69, with that of Dr. Packer, Tr. 552-60, J.A. 300-08.

roughly circular with a diameter of about ¼ of an inch, which agreed with his previous examination of pitman arms that failed in actual use, including the Arbuckle pitman arm. He used this figure in preparing pitman arms for experiments in which separation occurred at final applied loads of less than 300 pounds.[41] GM argued that Dr. Weiss's technique of machine notching the test pitman arms made them unrepresentative of pitman arms with real cracks, while Dr. Weiss maintained that this difference was not significant in that a given size crack would weaken the arm more than a notch of the same size.[42]

B. *Findings and Role of the Trial Court*

The district court found, on the issue of unreasonable risk of failure above low speed that the government had not met its burden of proof. It reasoned:

> The allegation that Dr. Weiss' experiments were not "true to life" was never rebutted by the government. Thus the "battle of the experts" was a standoff. The government did not show by a proponderance [*sic*] of the evidence that a fatigue crack would normally propagate so far that the remaining cross-section could break under normal or high speed maneuvers.[43]

Since the issue of when pitman arm failures occur is part of GM's rebuttal case,[44] this conclusion reflects an incorrect allocation of the burden of proof. In general, under Fed. R. Civ. P. 52(a), the appellate court is bound by the district court's findings of fact unless they are

[41] Tr. 124, J.A. 132.

[42] Tr. 123, 125, 145, J.A. 131, 133, 142.

[43] *Pitman Arm, supra,* Memorandum at 11 (Apr. 25, 1975), J.A. 707.

[44] *See* section II.B, *supra.*

"clearly erroneous." [45] The scope of review is narrower, and particular caution is indicated, where credibility of witnesses is involved.[46] However, "insofar as that conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law." [47]

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[45] A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.

United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

[46] Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience.

Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 609-10 (1950). *See also* Zenith Radio Corp. v. Hazeltime Research, 395 U.S. 100, 123 (1969); Jackson v. United States, 122 U.S.App.D.C. 324, 327, 353 F.2d 862, 865 (1965).

[47] United States v. Singer Mfg. Co., 374 U.S. 174, 194 n. 9 (1963). We have summarized the "clearly erroneous" standard, concluding as follows:

> On the other hand, a finding is "clearly erroneous" if it is without substantial evidentiary support or if it was induced by an erroneous application of the law. Beyond that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In reviewing the trial judge's decision in this case, then, we must look to all of the evidence of record to determine whether the findings can pass muster. And in making that determination, we also bear in mind that conclusions of law do not find shelter in the "clearly erroneous" requirement.

[Continued]

The district court was affected by its apprehension that the government had failed to rebut the allegations that Dr. Weiss's experiments were not "true to life." By the same token, the court should have been troubled by the absence of GM's rebuttal to the Arbuckle incident. The court was presented with conflicting testimony of experts as to whether pitman arms fail virtually only in high stress situations. Mrs. Arbuckle gave testimony of a real life event which supported the government's theory. According to GM's own measurements, that pitman arm failure occured at low stress.[48] GM seeks to dismiss the Arbuckle evidence as "only one incident of alleged pitman arm failure." [49] This misses the point. Where there is a choice between theories which say that something is possible or impossible, there is special significance in a real life incident, albeit a single instance, in which it has happened.

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[47] [Continued]

Case v. Morrisette, 155 U.S.App.D.C. 31, 38-39, 475 F.2d 1300, 1307-08 (1973). *See also* Wright & Miller, Federal Practice and Procedure: Civil § 2585 (1971).

[48] The Keller table, *supra* note 37, gives a stress of 670 lbs. for a 15 mph 90° turn. GM attempts to bring the Arbuckle incident into the low speed class, stating:

> [a] Government expert witness (Raymond Caldwell) testified that a Cadillac speedometer reads 12 to 13 mph at a true speed of 10 mph. Mr. Arbuckle's 10 to 15 mph reading therefore corresponds to a true speed of from 8 to 11 mph and decreasing.

GM Br. at 12, n. 12. There is no finding of the trial court to the effect of a reduced Arbuckle speed. Furthermore, there is no listing in the Keller table for a 10 mph 90° turn—a commonplace maneuver. Failure to introduce this datum which is essential to gauging the impact of this reduced speed argument can only be interpreted to show that the datum would be unfavorable to GM, *i.e.* that at best (for GM), the applied stress would remain in the low (1000 lbs. or less) range.

[49] GM Br. at 12.

The district court referred to the Arbuckle incident in making its overall balance of the risk from pitman arm failures,[50] but did not gauge the effect of the occurence on the supposed "stand-off" in the "battle of the experts."

Apart from the application of an incorrect burden of proof, there is a problem in the district court's cursory treatment of the when-pitman-arms-fail issue as a stand-off. The mere fact that experts disagree does not mean that the party with the burden of proof loses. The finder of fact has to make the effort to decide which side has the stronger case. This can be based on the demeanor of the witnesses (if so, the trial judge should say so) or the intellectual strength of the evidence and arguments based thereon.

While an appellate court is limited in its review of factual findings, it may rightfully consider whether the trial judge has weighed and appraised the case in the light of the "whole record." There may be cases of true equipoise of evidence, but this should not be used as the ground of decision unless there is a reasoned conclusion that the efforts of the trial judge at weighing evidence leave no alternative.

The obligation on the trial judge to make this effort and judgment is particularly pronounced in this type of case, involving a regulatory process to safeguard public safety prospectively. Although an agency is involved in bringing the case, there is no administrative decision-making. The district court must decide the issue of whether there is a safety-related defect de novo. Such a safety case calls for more than cursory application of

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[50] Therefore the government's demonstration that the Arbuckle-type experience has happened did not prove that it would happen sufficiently often to create an unreasonable risk to safety. On the contrary, GM offered Dr. Tetelman's risk analysis as evidence that it will not. *Pitman Arm, supra,* Memorandum at 13 (Apr. 25, 1975), J.A. 709.

traditional burden of proof concepts. Rather, it requires a searching inquiry by the trial judge of the totality of the evidence in the case. On the basis of this evidence, he must go through the intellectual process of resolving the issues, rather than throwing up his hands in the face of conflicting evidence.[51]

In the course of this inquiry, the judge's role in eliciting evidence may go beyond asking questions of witnesses. The active role of the federal judge in criminal trials is well established.[52] The similar considerations

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[51] This conclusion is in the context of a trial and for the purpose of applying the correct legal standard. There is, of course, no requirement that the judge satisfy himself that his conclusion represents "scientific reality." Rather, what is required is careful analysis and weighing of the evidence presented to reach a factual conclusion adequate for application of the proper legal standard.

[52] Our cases have consistently recognized the important role the trial judge plays in the federal system of criminal justice. "[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."

The precepts of fair trial and judicial objectivity do not require a judge to be inert. The trial judge is properly governed by the interest of justice and truth, and is not compelled to act as if he were merely presiding at a sporting match. He is not a "mere moderator." As Justice Frankfurter put it, "[f]ederal judges are not referees at prize-fights but functionaries of justice." Johnson v. United States, 333 U.S. 46, 54, 68 S.Ct. 391, 395, 92 L.Ed. 468 (1948) (dissenting in part). A federal trial judge has inherent authority not only to comment on the evidence adduced by counsel, but also—in appropriate instances—to call or recall and question witnesses. He may do this when he believes the additional testimony will be helpful to the jurors in ascertaining the truth and discharging their fact-finding function. What is required, however, are reins of restraint, that he

apply when a case involves the safety of the public. In a non-jury trial, there is merger of the functions of umpire, trier of fact, and decider of the law in the trial judge.[53] In the interest of justice, and the public, the judge may rightly express his critical concerns and probe for responses.

C. *Disposition of the Issue*

If the case turned on this issue of when pitman arm failures occur, we would have to remand for further findings. This court cannot reach a conclusion since we have not had the trial court's opportunity of seeing and hearing the contending evidence. Neither could we be confident of the intent underlying the district court's "stand-off" reference. If this reflects a judgment that the evidence truly approximates equipoise, GM loses for failure to sustain its burden of rebuttal. But it may be, and this is intimated by the flavor of the opinion, that the district court found GM's evidence on the issue preponderant, and merely expressed this result in a soft or minimal way, consistent with its view of the burden of proof, but not adequate under our view.

Without resolving this uncertainty, this opinion will assume, *arguendo*, that the district court would have found that GM had met its burden on this issue and that we could not say that this finding was clearly erroneous. Even making this assumption, most favorable to GM,

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not comport himself in such a way as to "tilt" or oversteer the jury or control their deliberations.

United States v. Liddy, 166 U.S.App.D.C. 95, 105, 509 F.2d 428, 438 (1974), *cert. denied*, 420 U.S. 911 (1975).

But see Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1041-45 (1975).

[53] *See* Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. Pa. L. Rev. 1067, 1069 n. 1 (1975).

GM has not carried its overall burden of rebuttal. This opinion now turns to the remaining issue of danger from pitman arm failure even restricted to low speed situations.

IV. Unreasonable Risk at Low Speeds

A. *Evidence*

In rebuttal to the government's "commonsense" prima facie case, buttressed by expert testimony on human reactions and the testimony of Mrs. Arbuckle,[54] GM offered the "risk analysis" testimony of Dr. Alan Tetelman.[55] This involved a supposedly conservative[56] estimate of the expected harm from pitman arm failures in the remaining service life of the 1959-60 Cadillacs based on data of previous experience with those cars and general accident statistics. GM manufactured 284,456 1959-60 Cadillacs, of which about 43,400 were still in use in 1974. GM estimated that these remaining cars would continue in use, on the average, a little over three years. On this basis, of the total miles driven in the cars, 96% of the model's service life had already occurred.

Dr. Tetelman used as his measure of risk an index called "total severity" which is the product of the mean severity per pitman arm failure times the expected number of pitman arm failures in the remaining model life. The concept of severity used was that used by the Consumer Product Safety Commission (CPSC).[57] This scale,

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[54] *See* text at notes 19-21, *supra*.

[55] *See* Tetelman and Burack, *An Introduction to the Use of Risk Analysis in Accident Litigation*, 42 Journal of Air Law & Commerce 133, 144-53 (1976).

[56] This means that at each step of the analysis where there were uncertainties, the least safety and greatest harm were supposedly assumed. *But see* text at nn. 58 & 59, *infra*.

[57] The CPSC collects and analyzes data by authority of 15 U.S.C. § 2054(a)(1). For a description of the National

based on a unit of a day lost due to injury, gives numerical values to injuries ranging from mild ones to death.

The mean severity of a pitman arm failure was taken as the probability that a pitman arm failure would lead to an accident times the severity calculated for an average accident caused by loss of steering due to pitman arm failure. The probability of failure was simply taken from GM's service engineer's file on the pitman arm problem. This contained an "events summary," which recorded all of the problem occurrences (complaints) allegedly related to pitman arms which were known to GM. Of these 158 events, as Loren Papenguth, GM's assistant chief engineer, testified, those that GM could not confirm [58] as involving the pitman arm were eliminated, which included some 19 accidents. Of the 64 or 65 "confirmed" pitman arm failures, Mr. Papenguth testified that two involved minor accidents. Thus, Dr. Tetelman

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Electronic Injury Surveillance System (NEISS), *see* W. Kimble, Federal Consumer Product Safety Act § 73 (1975) and the CPSC monthly publication, NEISS News.

[58] On February 10, 1975, Mr. Papenguth testified:

> Well, from the total of some 158 events that we examined we were able to determine or confirm on the order of 64 or 65 Pitman Arm separations fatigue-induced.
>
> And of those 64 or 65 fatigue-induced separations, we found two cases of accidents reported which, from all indications, were minor certainly with no injuries and no deaths involved.

Tr. 1048.

> [W]e used the term "inconclusive" in our judgment for those cases where the evidence was inadequate to confirm a Pitman Arm separation, that a Pitman Arm separation had occured; that the circumstances and all of the material that had been submitted to us, included in our events file, would not merit a conclusion or would not justify a conclusion one way or the other.

Id. at 1050.

took as the probability of accident from a pitman arm failure, the ratio 2/64.

The average severity of a pitman arm accident was computed using data from police accident reports in Texas during 1969-73 and from the National Safety Council on the distribution of accident severity depending on the speed preceding the accident. Dr. Tetelman took the Texas accidents resulting from steering defects (as reported in the police reports) for his data base on the frequency-severity distribution. The Texas police reports used the rough National Safety Council Classification: fatal; incapacitating injury; non-incapacitating injury; no injury. Dr. Tetelman recalculated these on his translation into the equivalent CPSC values. In view of his testimony that pitman arm separations would only occur at low speeds, Dr. Tetelman normalized the steering defect distribution to the distribution of all accidents in the low speed (0-9 mph) range. With these assumptions, he arrived at a figure for the mean severity of a pitman arm failure.

The expected future number of pitman failures was based on a survey of 613 1959-60 Cadillac owners (commissioned by the government), in which 17 stated that they had suffered pitman arm failures. The calculation assumed that, since there was no indication of an upturn in failure rate, the future failure rate would be the same as the historical one. Using GM's data on the number of remaining Cadillacs in use and their expected three year remaining life, Dr. Tetelman calculated that there would be about 250 pitman arm separations in the future (as of 1974).

Putting these two factors together, the mean severity and the future expected frequency, Dr. Tetelman predicted that the conservatively calculated future harm was: a very small chance (less than 1%) of a fatality

and about one incapacitating and one non-incapacitating injury.

The government presented numerous objections and rebuttals to Dr. Tetelman's risk analysis. It objected to the use of the Texas accident data as hearsay for which there was no evidence presented of its accuracy and reliability. The government criticized Dr. Tetelman's analysis for disregarding, *i.e.*, assigning no value whatever to: accidents involving mild injuries less than internal organ injuries, *e.g.* sprains, bruises and scalds; accidents involving "possible injury," *i.e.*, injuries claimed subjectively, but not medically verifiable objectively, at the time of the accident (with no "reserve" for the possibility of later confirmation with symptoms and even death); and accidents involving property damage but no injuries.[59]

The government further criticized Dr. Tetelman's reliance on GM's engineering files on pitman arm complaints for the ratio 2/64 on the basis of uncertainties in how the file was compiled and made to include other data available from GM and its dealers. The survey of Cadillac owners used to estimate the expected future number of pitman arm failures was never introduced in evidence and was considered unreliable by the government. The government pointed out that the fraction of past pitman arm failures implied by the survey was undercut by other, more solid evidence, being only one-fourth as great as the ratio implied by the excess (over adjacent models) of replacement pitman arms sold as compared to the total 1959-60 Cadillacs sold. Finally, the government presented an expert in statistics to rebut the methodology of Dr. Tetelman (who did not claim expertise in statistics) in inferring the risk of future harm, as well as criticizing the statistical significance of his input data.

[59] Tr. 874-78, J.A. 464-68.

B. *Findings*

In finding that GM had rebutted the government's "slim *prima facie* case" [60] with Dr. Tetelman's testimony, the district court stated:

> In the case of these Cadillacs, there is no documented injury or death resulting from pitman arm failure, as NHTSA has admitted. Furthermore there are few documented accidents. The cars are now fifteen years old. 96% of their life had been completed by the end of 1973. At the start of 1975 there were approximately 33,000 still in service. And the vehicles have travelled, in the aggregate, approximately 24 billion miles. *On the basis of this extensive past experience,* Dr. Tetelman projected a negligible risk in the extremely limited future that remains for these automobiles.[15]

[15] Dr. Tetelman used other data as well, but the Court relies on that portion of his analysis which is based on the life history of these automobiles.[61]

It is, candidly, puzzling to ponder the district court's statement that it relied only on the 96% life history "portion" of Dr. Tetelman's "risk analysis" testimony, presumably meaning that the court severed that part of the analysis involving data challenged by the government, such as the Texas accident data and the survey of Cadillac owners. Yet these were all essential elements of Dr. Tetelman's purportedly conservative estimate of the likely injuries to be expected from pitman arm failures. The "life history," *i.e.* that 96% of the model's service life has expired, does not indicate negligible risk in the remaining life of the cars in use unless coupled with proof of lack of accidents in the cars' use in the past. There is

[60] *Pitman Arm, supra,* Memorandum at 3 (Apr. 25, 1975), J.A. 699.

[61] *Id.* at 12-13, J.A. 708-09 (emphasis added).

an unstated assumption to the effect that if there had been injuries and death from pitman arm failures in the past, it would be known by someone. This presumption surfaces in the first two sentences quoted above. If the government could not come up with "documented injur[ies] or death[s]," the district court would draw an inference based on this presumed safe "life history" of the model.

The district court's finding on GM's rebuttal thus reflects an incorrect allocation of the burden of proof, as developed in section II.B, *supra*, and therefore should be set aside.[62] Application of the correct standard leads to the conclusion that the "risk analysis" evidence presented in this case is incapable of carrying GM's burden of rebuttal. It suffices to focus on the figures used: that of the 64 complaints in the GM files which were considered "confirmed" instances of pitman arm failures, only two involved "reportable accidents." The government's expert in statistics testified that, this was a miniscule sample of the thousands of pitman arm failures indicated by the replacement part sales,[63] which would suffice by itself as proof of the characteristics of pitman arm failures generally. Significantly, there was no attempt by GM to prove that this was a representative sample.

VI. Conclusion

Logically, this would indicate that we should reverse the judgment and order judgment entered for the government on remand. However, the case was not tried before us. This appellate court may not properly act as the finder of fact, since there may be some ramifications of the evidence or fact-finding functions we have not fully discerned. In any event, there must be a remand or determination of appropriate relief.

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[62] *See* note 47, *supra*.

[63] Tr. 1237.

This opinion concludes that in the remand for further proceedings the district court may and should reconsider the safety-related issue in light of the standard of proof and rebuttal set forth herein.

In its enforcement action, the government sought a civil penalty of $400,000 for failure to furnish the defect notifications.[64] In approving the statutory scheme whereby a manufacturer runs the risk of such a penalty by litigating the merits of a notification order after failing to obtain temporary relief, a three-judge district court approved the purpose of deterring frivolous litigation, while permitting substantial challenges to be raised.[65] The Supreme Court affirmed, *Ford Motor Co. v. Coleman*, 425 U.S. 927 (1976). The district court left open the standard and interplay of factors which determine the actual amount of the penalty set.[66] The district court has latitude to take into account its view of the seriousness of the safety-related defect and the manufacturer's good faith.

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[64] Section 109(a), 15 U.S.C. 1398(a), provided, at the time the government brought suit, a civil penalty of $1000 per violation, *i.e.*, for each affected automobile, with a maximum of $400,000 for each related series of violations. The 1974 amendments, which do not affect this case, increased the maximum to $800,000. *See* note 7, *supra*.

[65] Ford Motor Co. v. Coleman, 402 F. Supp. 475, 490 (D.D.C. 1975), *aff'd.* 425 U.S. 927 (1976).

[66] More important, the $800,000 figure represents a maximum, not a minimum. There clearly is room for the court to set a substantially lower figure. The statute expressly authorizes the court to consider "the size of the business of the person charged and the gravity of the violation" in determining the amount of the penalty. Moreover, as the Government seems to concede, the reasonableness and good faith of the manufacturer's noncompliance may properly be considered in mitigation of the statutory maximum.

Id. at 489 (citations omitted).

Since most of the affected cars are no longer in operation, the import of my disagreement with the majority has more to do with the doctrine we establish for governance of this type of case in the future than the result in the case of the 1959-1960 Cadillacs. The majority elevates facts which give rise to a strong suspicion of dangerousness into a conclusive presumption of the existence of a safety-related defect. I would allow the manufacturer the opportunity to dispel this justified apprehension by proof that failure due to the defect does not occur in a dangerous fashion and that the risk arising from the defect is therefore inconsequential.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 75-1751 September Term, 1976

THE UNITED STATES OF AMERICA,
v. *Appellant*
GENERAL MOTORS CORPORATION,
a corporation

Civil Action 74-277

No. 75-1752

GENERAL MOTORS CORPORATION,
a Delaware Corporation
v.
BROCK ADAMS, et al.,
Appellants,

Civil Action 74-1053

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: WRIGHT, LEVENTHAL AND ROBB, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. Upon consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from herein is reversed; and these cases are remanded to the District Court for determination of appropriate relief, in accordance with the opinion of this Court filed herein this date.

United States Court
of Appeals
for the District of
Columbia Circuit
Filed June 28, 1977
GEORGE A. FISHER
Clerk

Per Curiam

For the Court:
GEORGE A. FISHER, *Clerk*
By: ROBERT A. BONNER
Robert A. Bonner,
Chief Deputy Clerk

Dated: June 28, 1977
Opinion per curiam.
Opinion dissenting in part by Circuit Judge Leventhal.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1751—September Term, 1976

THE UNITED STATES OF AMERICA, *Appellant* v. GENERAL MOTORS CORPORATION, a corporation	Civil Action 74-277

And consolidated case No. 75-1752

Before: WRIGHT, LEVENTHAL and ROBB, *Circuit Judges.*

ORDER

On consideration of the petition for rehearing filed by appellant General Motors corporation, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
George A. Fisher
Clerk

*Judge Leventhal would have granted appellee's petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1751—September Term, 1976

THE UNITED STATES OF AMERICA, *Appellant* v. GENERAL MOTORS CORPORATION, a corporation	Civil Action 74-277

And consolidated case No. 75-1752

Before: BAZELON, *Chief Judge,* WRIGHT, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

ORDER

The suggestion for rehearing *en banc* filed by appellant General Motors corporation, having been transmitted to the full Court and no judge having requested a vote with respect thereto, it is

ORDERED, by the Court *en banc,* that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
George A. Fisher
Clerk

*Judge McGowan did not participate in this order.

APPENDIX D

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

GENERAL MOTORS CORPORATION,
Plaintiff,

v.

CLAUDE S. BRINEGAR, as Secretary of Transportation, *et al.*, *Defendants.*

Civ. A. Nos. 74-277 and 74-1053.

United States District Court,
District of Columbia.
Oct. 16, 1974.

Jeffrey Axelrad, Atty., Department of Justice, Washington D. C., for plaintiff United States of America.

James J. Robertson, Washington, D. C., for General Motors.

MEMORANDUM

GASCH, District Judge.

This matter is before the Court on cross-motions for summary judgment and oppositions thereto.[1]

The action arises under Title I of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (Act of September 9, 1966, 80 Stat. 718 et seq., 15 U.S.C. § 1381 et

[1] The Court has granted leave for Stanton R. Koppel of the Center for Auto Safety, Washington, D. C., to file a memorandum as *amicus curiae*.

seq.) (hereinafter referred to as the Act). General Motors (hereinafter referred to as GM) is a corporation organized under the laws of Delaware and is a "manufacturer" within the meaning of Section 102(5) of the Act (15 U.S.C. § 1391(5)).

I. FACTUAL BACKGROUND.

During the period which encompassed model years 1959 through 1960, GM manufactured and sold approximately 284,456 Cadillac automobiles. GM estimates that approximately 43,400 are still in use.[2]

On September 13, 1972, some twelve years later, the Center for Auto Safety, Washington, D. C., forwarded to the Office of Defects Investigation, National Highway Traffic Safety Administration (hereinafter referred to as NHTSA)[3] information alleging the existence of a safety-related defect in the design and performance of the steering pitman arm in the 1959-1960 model year Cadillacs.[4] The pitman arm is a critical component of the steering system. It connects the steering shaft to the steering linkage. If it fails, directional control of the vehicle is lost.

NHTSA initiated an investigation of the pitman arm which included tests, interviews with a representative group of vehicle owners who had complained of failures, submissions from GM which disclosed an unusually large number of replacements of pitman arms, and a hearing conducted on November 6, 1973.[5] As a result of this investigation, NHTSA, acting pursuant to Section 113(e) of the Act (15 U.S.C. § 1402(e))

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[2] Affidavit of Alexander I. Pirie, Manager, Analysis, Product Assurance Department, Environmental Activities Staff, GM, August 2, 1974, ¶ 2.

[3] The director acts pursuant to the authority delegated to him by the Secretary of Transportation. 49 C.F.R. § 1.51.

[4] The term, "pitman arm," refers to the steering pitman arm on the 1959-1960 model year Cadillac unless otherwise stated.

[5] All of these items are contained in the extensive Administrative Record and its Supplement.

> determined that a defect which relates to motor vehicle safety exists with respect to the steering pitman arm on 1959-1960 model year Cadillac automobiles, in that these pitman arms are subject to sudden and catastrophic failure, causing loss of steering control, and resulting in an unreasonable risk of accidents, deaths, and injuries to persons using the highways.[6]

By letter dated January 10, 1974, NHTSA directed GM to furnish the notification specified in Section 113(c) of the Act (15 U.S.C. § 1402(c)) to the purchasers of these automobiles.

On January 11, GM filed a suit in the U.S. District Court for the Eastern District of Michigan (G.M. v. Brinegar, et al., Civ.A. No. 4-70939) seeking a declaration that the agency determination was unlawful and void and an injunction resisting enforcement of the agency's order. GM obtained a temporary restraining order. On February 13, GM's motion for a preliminary injunction was denied and the temporary restraining order vacated by the Michigan Court. On that same day the United States (hereinafter referred to as US) filed a suit in this Court (U.S. v. G.M., Civ. A. No. 74-277) to enforce NHTSA's order under Section 110(a) of the Act (15 U.S.C. § 1399(a)).[7] The Michigan action for declaratory relief and an injunction was transferred to this Court on July 8 (as Civ.A. No. 74-1053). GM has yet to furnish the notifications to purchasers as ordered by NHTSA.

II. SUMMARY JUDGMENT

(a) Defect.

On March 5 the US moved for summary judgment on the basis of the Administrative Record. This record contains

[6]Letter dated January 10, 1974, from James B. Gregory, Administrator, NHTSA, to E. M. Cole, President, GM, Administrative Record, Exhibit S-34, p. 2.

[7]Additionally the US seeks $400,000 in civil penalties from GM pursuant to Section 109(a) (15 U.S.C. § 1398(a)) for failure to issue the safety defect notifications. The Court does not decide this at this time.

data supplied by GM[8] which shows that roughly 9.3% (26,424) pitman arms were subject to replacement for the 1959-1960 model year Cadillacs. This compares with a 1.68% (4,519) replacement rate for the 1957-1958 model, and a 1.48% (4,423) replacement rate for the 1961-1962 model. The design of the pitman arm for the year in question differs from the previous year's design as well as that of the following year. GM is unable to provide a reason for the difference in replacement rates.[9]

The US contends that this unusually high replacement rate constitutes *prima facie* proof that the pitman arm contains a defect. The US bases this argument on the WHEELS case (United States v. G.M., D.C., 377 F. Supp. 242), decided by this Court on June 13, 1974, in which we held that a large number of failures of 15 x 5.50 Kelsey-Hayes disc wheels constitutes *prima facie* proof of the existence of a defect in performance under Section 102(11) of the Act (15 U.S.C. § 1391(11)). The US seeks to carry that decision one step further in this case.

As will become apparent, this case is clearly distinguishable from WHEELS. In WHEELS there was no controversy between the US and GM over whether there existed a large number of failures; in this case there is such a

[8]Administrative Record, Exhibit 2, Figure 11, September 26, 1972. Figures submitted June 20, 1974, in GM's August 5 memorandum of opposition to motion for summary judgment are slightly higher.

GM emphasizes that these figures reflect *sales* of pitman arms to dealers, not installations on automobiles. *See* Affidavit of Loren R. Papenguth, Assistant Chief Engineer for Cadillac Motor Car Division of GM, August 2, 1974, ¶ 7. The Court believes it is safe to assume that these parts were not purchased by dealers to sit on their shelves.

GM further suggests that pitman arm replacement may have occurred for reasons other than fatigue-induced failure: improper lubrication and maintenance, hard usage creating excessive ball stud wear, excessive loads due to improper torquing techniques, hoist damage, accident damage, and precautionary measures taken by dealers. The Court does not think these other reasons can by themselves account for such an unusually high replacement rate.

[9]Statement of L. R. Papenguth at the administrative hearing on November 13, 1973. Administrative Record, Exhibit S-24, pp. 37-38.

controversy. In WHEELS there was no dispute over whether such failure constituted an unreasonable risk of accidents, death or injury; that *is* the dispute in this case. In WHEELS the primary questions were the interpretation of the statutory words, "defect in performance" and what proof is necessary to show a defect in performance; in this case, which is a case of first impression, the primary questions are the interpretation of the statutory words, "unreasonable risk" and what proof is necessary to show that a defect poses an unreasonable risk of accidents, death or injury.

The Administrative Record also contains the results of tests conducted for NHTSA by the Essex Corporation of Alexandria, Virginia, a private testing corporation under contract to NHTSA. These tests confirmed information supplied by GM[10] that the pitman arm can fail from metal fatigue after a large number of high stress maneuvers such as occur in parking and turning.[11] According to the US, either the report of the tests or the high replacement rate is sufficient to prove a defect in design or performance under Section 113(e)(2) of the Act (15 U.S.C.§ 1402(e)(2)).

The Court does not reach the question of whether an unusually high replacement rate is *prima facie* proof under the Act of the existence of a defect. The test results are sufficient to indicate such a defect. Whether this is a defect which relates to motor vehicle safety is a more difficult question.

(b) Unreasonable Risk.

The Act is not concerned with all defects, but only with "a defect which relates to motor vehicle safety" (Section 113(e)(2), 15 U.S.C.§ 1402(e)(2)). It defines "motor vehicle safety" in Section 102(1) (15 U.S.C.§ 1391(1)) as

> the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected

[10]Administrative Record, Exhibit 6.

[11]Administrative Record, Exhibit 15.

> against *unreasonable risk of accidents* occurring as a result of the design, construction or performance of motor vehicles and is also protected against *unreasonable risk of death or injury* to persons in the event accidents do occur . . .. (Emphasis added.)

The US relies for summary judgment on the logical assumption that a defect involving the steering mechanism which leads to a loss of directional control creates an unreasonable risk of accidents, death or injury at any speed. It points to the fact that 10.7% of all fatal accidents occur at speeds of less than 20 miles per hour, and over 34.2% of all accidents resulting in injuries occur within this speed range.[12]

GM replies that fatigue-induced failure in the pitman arm constitutes no risk to safety because failure can occur only when the wheels are turned to or nearly to their extreme limits.[13] This condition is reached only in parking or turning at very slow speeds, when loss of directional control can be checked by braking, or when the automobile is standing virtually still.

To substantiate this contention GM recounts its history of the 1959-1960 model year Cadillacs: 24 billion miles traveled; 144 reported incidents alleging pitman arm failure, only 19 of which included accidents, and none of which resulted in personal injury or death.[14] If summary judgment is to be granted on the basis of the Administrative Record, argues GM, it should be granted in favor of GM's motion since the record demonstrates that pitman arm failure is not an unreasonable risk.

The US disputes GM's figures and alleges a larger number of pitman arm failures, including at least one occurrence at

[12]This data is taken from the 1972 edition of "Accident Facts" published by the National Safety Council, Chicago, Illinois, and is in the Administrative Record, p. 17.

[13]Papenguth Affidavit, ¶ 8.

[14]Papenguth Affidavit, ¶¶ 4, 5, 6. Mr. Papenguth maintains that in 17 of the 19 alleged accidents there is no evidence of pitman arm failure.

high speed.[15] The figures of both sides are ambiguous, however, because they are based primarily on consumer complaints, many of which were submitted long after the alleged pitman arm failures. There was never opportunity for NHTSA to examine a defective pitman arm to determine whether it had failed from metal fatigue, and, if there was an accident associated with the alleged failure, whether pitman arm failure was its cause.

The figures may be ambiguous, but the law is clear that summary judgment can be granted only if "there is no genuine issue as to any material fact." Rule 56(c), Fed.R.Civ.P. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Semaan v. Mumford, 118 U.S.App.D.C. 282, 283, 335 F.2d 704, 705 (1964). The party opposing summary judgment "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence for the purpose of defeating summary judgment." Semaan v. Mumford, *supra*, *quoting* 6 Moore, Federal Practice 2114 (2d ed. 1953). To defeat a summary judgment motion, the opposing party need not prove that the factual inferences drawn by the moving party are actually incorrect; it is enough for the opposing party to show that contrary inferences "might be permissible." United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam). These principles have been consistently followed by the United States Supreme Court[16] and by the United States Court of Appeals for this Circuit.[17] If material facts are found to be in

[15]Administrative Record, p. 7, and Exhibit 9, Zanfardino report.

[16]United States v. Diebold, Inc., *supra*. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

[17]Rodway v. United States Dep't of Agriculture, 157 U.S.App.D.C. 133, 138, 482 F.2d 722, 727 (1973); Bloomgarden v. Coyer, 156 U.S.App.D.C. 109, 114-115, 479 F.2d 201, 206-207 (1973); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1973); Washington v. Cameron, 133 U.S.App.D.C. 391, 395-396, 411 F.2d 705, 709-710 (1969); Underwater Storage, Inc. v. United States Rubber Co., 125 U.S.App.D.C. 297, 300, 371 F.2d 950, 953 (1966), cert. denied, 386 U.S. 911, 87 S.Ct. 859, 17 L.Ed.2d 784 (1967); Semaan v. Mumford, *supra*.

dispute a motion for summary judgment must be denied and a trial held.[18]

III. CONCLUSIONS

There is a certain appeal to the government's argument that a defect which may result in a loss of steering control is, *ipso facto*, a safety-related defect under the Act. One need only ask whether he would consider loss of steering control, even at a very slow speed, a reasonable or unreasonable risk.

The Act is more limited, however. Under its standard, a safety-related defect must pose, not just a risk of accidents, death or injury, but an *unreasonable* risk. The inclusion of the adjective "unreasonable," as well as the legislative history[19] make the question of whether fatigue induced failure of the pitman arm creates such an unreasonable risk a matter of fact, not of supposition. The US says pitman arm failure can occur at high speeds but is an unreasonable risk at any speed; GM says pitman arm failure cannot occur at high speeds and does not pose an unreasonable risk at slow speeds. This is an issue of fact which cannot be resolved by logic alone. And it is an issue of material fact under the law of summary judgment. Therefore, the government's motion for summary judgment will be denied.

On this factual issue the automobile's road history is enlightening but not conclusive. For one thing, the history itself is a matter of dispute between the parties. Even more important, the Act looks less to the past than to the future. Its purpose is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." (Section 1, 15 U.S.C. § 1381). It seeks to prevent accidents before they occur; that is the function of the statutory defect notification program. Whether fatigue-induced failure of the pitman arm creates an unreasonable risk depends upon,

[18]This is not a case of review of an administrative record.

[19]During the hearings on this bill before the Senate Committee on Commerce, Senator Ribicoff, testifying in support of the bill, raised the

among other things, whether failure can occur at high speeds. The Administrative Record, which looks retrospectively at GM's road history of this automobile, is insufficient to settle this dispute. Therefore, GM's motion for summary judgment will be denied.

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question of how strict the standards to be promulgated by the Secretary [of Commerce] would be. This discussion followed:

> Senator Pastore (a member of the Committee): Abe, I quite agree with you, and this requires more commonsense and it will not cost much more money. There is no question about that. But we are discussing here the technicalities and guidelines and formulas that we have to put in words to give guidance to the Secretary of Commerce so that he knows what his limits are, to promote this commonsense that we are talking about. And that is where I think we are going to have a tremendous amount of difficulty.
>
> I think we are all agreed now, we are all agreed, that heretofore we haven't concentrated enough thought on this question of safety, and who is primarily responsible.
>
> You are developing today the thesis that in the past the automobile industry could have done a whole lot more, and had they done it, we wouldn't be confronted with this legislation today.
>
> Now we are giving this authority to the Secretary of Commerce. And we have to tell him, as a committee and as a Congress, how far he can go and how far he can't go. And that is where we are going to have trouble.
>
> Senator Ribicoff: It is complex. In addition to the Secretary of Commerce, I think you can call upon the men who have been working in this field at Harvard, Cornell, and UCLA. And I think the automobile industry should be called in to explain the impact that standards will have on them and how this will work out. I think you should have testimony from the GSA.
>
> Senator Magnuson (chairman of the Committee): GSA is going to testify tomorrow, and the automobile industry later.
>
> May I say at this point, and it might throw a little light on this, section 101 of the bill says:
> (He reads Section 101 of the Senate bill, S. 3005, which became Section 102(1) of the Act, 15 U.S.C. § 1391(1), quoted above, p. 118 of this Memorandum.)
>
> The reason the word "unreasonable" was put in there is that there will be some commonsense applied to this, such as the Senator from Rhode Island (Pastore) has pointed out.

Hearings on S. 3005 Before the Senate Committee on Commerce, 89th Cong., 2d Sess., ser. 89-49, at 56 (1966).

Although this discussion related to promulgation of standards under Section 103 of the Act (15 U.S.C. § 1392), the Court finds that this "commonsense" approach is intended to be applied to the Act as a whole.

It is significant in this regard that Section 103(f)(3) requires reasonableness in prescribing standards: The Secretary shall consider, among other things,

> whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed.

The General Counsel of the Commerce Department stated in a letter to the Senate Commerce Committee:

> The tests of reasonableness of cost, feasibility and adequate lead time should be included among those factors which the Secretary could consider in making his total judgment.

The Committee Report to the Senate quotes this portion and says,

> The committee intends that safety shall be the overriding consideration in the issuance of standards under this bill. The committee recognizes,as the Commerce Department letter indicates, that the Secretary will necessarily consider reasonableness of cost, feasibility and adequate lead time.

S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966).

APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
GENERAL MOTORS CORPORATION,
Defendant.
Civil Action No. 74-277

UNITED STATES OF AMERICA, [sic]
Plaintiff,
v.
CLAUDE S. BRINEGAR, ET AL.
Defendants.
Civil Action No. 74-1053

MEMORANDUM

This action arises under Title I of the National Traffic and Motor Vehicle Act of 1966, as amended (the Act).[1] The United States (US) seeks to obtain an order in the nature of an injunction requiring General Motors (GM)[2] to notify the owners of 1959-1960 model year Cadillac automobiles that the vehicles contain a defect which relates to motor vehicle safety.

Specifically the US contends that these automobiles were manufactured with defective pitman arms[3] which are subject to sudden failure, causing loss of steering control and

[1]Act of September 9, 1966, 80 Stat. 718 *et seq.*, 15 U.S.C. § 1381 *et seq.*

[2]GM is a corporation organized under the laws of Delaware and is a "manufacturer" within the meaning of Section 102(5) of the Act (15 U.S.C. § 1391(5)).

[3]The function of the pitman arm is to transfer the angular motion of the steering gear to a lateral motion of the drag link and the tie rods causing the front wheels to turn. If it fails, directional control of the vehicle is lost.

resulting in an unreasonable risk of accidents, injuries or death. GM opposes the relief being sought by the US contending that the defect in these Cadillacs does not result in an *unreasonable* risk of accidents, injury or death, which is the statutory standard[4] because failure occurs only in parking and other low speed maneuvers, when loss of directional control can be checked by braking.

This litigation was previously before the Court on cross-motions for summary judgment and oppositions thereto. By Memorandum and Order dated October 16, 1974,[5] this Court found that no genuine issue existed as to whether these vehicles contain a defect, holding that a defect exists. But the Court also held that the question of whether the defect results in an *unreasonable* risk of accidents, injury or death within the meaning of the Act was a disputed issue of fact which must be tried *de novo*.[6]

By Order dated December 10, 1974, the Court set three issues to be tried:

> (1) Does pitman arm failure at relatively low speeds such as those encountered in parking, driveway maneuvers, and other low speed maneuvers such as U-turns, create an unreasonable risk of accidents, injuries or death?
>
> (2) Can a pitman arm failure occur at normal driving speeds or at high speed highway driving as a result of metal fatigue induced from or incident to parking and driveway maneuvers?
>
> (3) If the answer to the question raised in the second issue is in the affirmative, does the normal speed or high speed possibility of pitman arm failure create an unreasonable risk of accidents, injury or death?

[4]Section 102(1), 15 U.S.C. § 1391(1).

[5]65 F.R.D. 115. That Memorandum opinion contains the history of the administrative proceedings before the National Highway Traffic Safety Administration.

[6]Counsel agree and Section 706(2)(F) of the Administrative Procedure Act makes it clear that *de novo* trial is required.

Trial *de novo* on these issues began February 3, 1975.[7] In a civil trial *de novo* such as this, the plaintiff bears the burden of proving his case anew by a preponderance of the evidence. In this trial the US was the plaintiff.

In the course of the trial the US made out a slim *prima facie* case on the testimony of Mrs. Karen Arbuckle concerning a recent pitman arm failure in her 1960 Cadillac and the metallurgical and metal fatigue tests and testimony of Dr. Volker Weiss. GM countered with the risk analysis and fracture mechanics tests and testimony of Dr. Alan Tetelman.[8] Since the government as plaintiff did not bear its burden of proof, the Court finds that the pitman arm defect in model year 1959-1960 Cadillacs does not create an unreasonable risk of accidents, injuries or death, and concludes that General Motors need not issue a defect notification to owners of these automobiles.

I. The Burden of Proof.

Since the outcome of this trial turns on the inability of the US to bear its burden of proof, it is important to be clear at the outset about the nature of an action to enforce a determination of the Secretary of Transportation that a defect related to motor vehicle safety exists about which a defect notification should be sent by the automobile manufacturer to owners.

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[7]The trial lasted six and a half days and involved seven expert witnesses, 100 exhibits, and is reported in 1245 pages of transcript.

[8]The US presented other witnesses, but their testimony was relevant only if the US first showed that a fatigue-induced failure of the pitman arm could occur at normal or high speeds or that such failure created an unreasonable risk at low speeds. Since the Court is finding that the government failed to make this showing, the additional evidence is not helpful.

Likewise GM offered other witnesses in addition to Dr. Tetelman, but since the Court is finding that Dr. Tetelman's testimony is sufficient to counter the main elements of the government's case, it is unnecessary to consider their testimony.

This has been well set forth by the Chief Counsel of the Federal Highway Administration in a letter to Senator Warren Magnuson dated November 11, 1969:[9]

> Under section 113 of the act (15 U.S.C. 1402), the Secretary cannot compel a manufacturer to send defect notification letters. . . . This is because Congress did not make the Secretary's orders self-executing. Thus, if a manufacturer disagrees with the Secretary's defect determination in a particular case, the Secretary can force the manufacturer to comply with the notification procedure only by asking the Attorney General to get a district court order directing such compliance. Section 110(a) of the act (15 U.S.C. 1399(a)) provides expressly for this procedure. . . .
>
> In any such enforcement proceeding the manufacturer is of course free to challenge the validity of the Secretary's defect determination. Section 10 of the Administrative Procedure Act expressly provides (with an exception not relevant here) that "*** agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703. Indeed, except where Congress has either precluded or provided some other forum for review—which is not the case under the Traffic Safety Act—that APA provision merely restates a long established tenet of administrative law. (Citations omitted)
>
> Moreover, it is the Secretary, as the party moving for injunctive relief (i.e. an order directing compliance), who bears the burden of proving to the court that his defect determination is correct and he is entitled to enforcement. As the Supreme Court said in United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 898 (1953), and repeated in United States v. Borden Co., 347 U.S. 514, 520, 74 S.Ct. 703, 707, 98 L.Ed. (1954), "[T]he moving party must satisfy the court that [injunctive] relief is needed." (Other citations omitted)

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[9]S. Rep. No. 91-559, 91st Cong., 2d Sess. 41-45 (1969)

Moreover, the district court proceeding is a trial *de novo*, not withstanding that under section 113(c) of the act (15 U.S.C. 1402(e)) the Secretary had already provided the manufacturer with all the information on which his defect determination was based and given the manufacturer opportunity to present its own views and evidence supporting them at an informal hearing. See, Jordan v. American Eagle Fire Insurance Co., 169 F.2d 281 (D.C. Cir. 1948), holding judicial review of an administrative determination to be "*de novo*" where the act did not provide for a full dress administrative hearing. Indeed, Jordan v. United Insurance Company of America, 289 F.2d 778 (D.C. Cir. 1961), goes so far as to hold that an agency's gratuitous grant of a quasi-judicial hearing not required by statute could not deprive a party of his right to a hearing *de novo* before a judicial tribunal. See also 1 Davis, Administrative Law Treatise (1948 ed), section 7.10. And section 10(e) of the Administrative Procedure Act makes express that the court, in a trial *de novo*, may disregard administrative determinations where it finds them to be "unwarranted by the facts," 5 U.S.C. 706.

That statement accurately reflects this Court's understanding of the nature of this action.

However, confusion has arisen because the government's suit to compel GM to issue the defect notification has been consolidated with GM's suit challenging the determination of the Administrator of the National Highway Traffic Safety Administration (NHTSA).[10] As a result, the US claims that the essence of this trial is a review of the reasonableness of the Administrator's determination in which GM is the plaintiff and bears the burden of going forward.[11]

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[10]*GM v. Brinegar* was transferred to this Court from the United States District Court for the Eastern District of Michigan. *See U. S.* v. *GM*, 65 F.R.D. at 117.

[11]Plaintiff's Reply to General Motors' Legal Memoranda at 3-4.

Such a contention misconstrues the nature of this action. The Administrator of NHTSA initiated this controversy by determining that the pitman arm in 1959-1960 Cadillacs contains a safety-related defect and ordering GM to send out defect notifications to owners. When GM refused, the US brought suit to enforce the Administrator's determination.

Basic to the Administrator's determination was the assumption that a defect which may result in a loss of steering control is, *ipso facto*, a safety-related defect under the Act. This Court rejected that argument, saying that whether fatigue induced failure of a pitman arm in this automobile creates an unreasonable risk of accidents, injuries or death cannot be resolved by logic alone. The Court ordered a trial in which the government could prove that the Administrator's determination was correct and entitled to enforcement. GM's action against the government is secondary and responsive. If the government wants its determination enforced, it must bear the burden of proving by a preponderance of the evidence that the pitman arm in this automobile contains a safety-related defect, which is a defect which presents an unreasonable risk of accidents, injuries or death.

II. The Evidence Presented at Trial

The trial was largely a battle of experts. Experts on both sides agreed that the original pitman arm on 1959-1960 Cadillacs[12] is defective in that it is subject to fatigue-induced separation (breaking) in the necked down portion adjacent to the ball-stud end.

They further agreed that the fatigue process begins with a crack which propagates as repeated cycles of alternating loads are imposed on the arm. The greater the magnitude of the load applied, the more rapidly the crack will grow. Conversely, the smaller the magnitude of the load, the less rapidly the crack will grow. Again, the larger the crack in

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[12]During model year 1960 the pitman arm was strengthened so that it was no longer subject to fatigue failure.

the arm, the more it will grow with the application of a given load. Conversely, the smaller the fatigue crack, the less it will grow with the application of that load.

They agreed that fatigue induced separation occurs if a fatigue crack becomes large enough so that the remaining material—the intact cross section—has become so small that it can no longer support the applied load.

The parties' experts also agreed that different maneuvers impose different loads on a pitman arm. For example, normal parking or U-turns at slow speeds exert over two thousand pounds of stress, whereas lane changes, S-turns, slow pothole impacts and 90-degree turns impose less than one thousand pounds of stress.

The parties differed as to how small the intact cross section can become before it will break. If the crack can become very long, so that the remaining intact cross section is very small, then a small load—as is encountered, for example, in a lane change at 70 m.p.h.—might be enough to cause separation. If, however, the crack cannot become very long, because heavier loads—such as normal parking maneuvers—will break it before it has a chance to get too long, then little hazard exists: the failure will occur in a parking maneuver long before it might occur in a high speed lane change.

Dr. Volker Weiss, the government's expert in metallurgy, expressed the opinion, based on his own knowledge and the examination of broken pitman arms, that a fatigue crack could propagate far enough so that remaining cross-section could become quite small. His tests indicated that such a small intact cross section could break under the load stress of normal driving maneuvers such as a fast lane change at 70 m.p.h., a 40 m.p.h. cornering maneuver, a 30 m.p.h moderate S-turn, a 10 m.p.h. ninety degree turn, or a five m.p.h. U-turn.

GM countered Dr. Weiss' conclusions with the expert opinion of Dr. Alan Tetelman[13] to the effect that the experiments conducted by Dr. Weiss on pitman arm separation did not accurately reflect the "real life" situation. Specifically Dr. Tetelman noted that Dr. Weiss had notched long circular cracks in the pitman arms before testing their load capacity. These long machine-induced cracks were unlike fatigue-induced cracks in two ways. First, the cutting was so clean that no interlocking metal remained, as would be the case in fatigue-induced crack propagation. Second, the machine-induced crack was longer and was circular, leaving a smaller and materially different cross-section intact, than occurs in real-life situations.

Dr. Tetelman's experiments traced the propagation of a fatigue-induced crack to separation. These experiments demonstrated that separation would occur under heavy loads such as parking and low speed maneuvers when the fatigue-induced crack had propagated through only about fifty per cent of the cross section, so that, in effect, the crack in real-life driving would seldom become so long that the pitman arm might break under the lighter loads experienced in normal or high speed driving maneuvers.

The allegation that Dr. Weiss' experiments were not "true to life" was never rebutted by the government. Thus the "battle of the experts" was a stand-off. The government did not show by a proponderance of the evidence that a fatigue crack would normally propagate so far that the remaining cross-section could break under normal or high speed maneuvers.

The US also offered the experience evidence of Mrs. Karen Arbuckle of Des Moines, Iowa. Mrs. Arbuckle testified that on November 7, 1974, the steering on her 1960 Cadillac failed without warning as she was making a right hand turn, and her vehicle proceeded diagonally into the

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[13]Other GM witnesses, such as Dr. Kenneth F. Packer, offered testimony similar to Dr. Tetelman's.

curb on the opposite side of the street into which she was turning. Fortunately the oncoming traffic lane was empty so there was no collision. An examination of the steering system revealed a separation of the pitman arm resulting from fatigue-induced failure. Mrs. Arbuckle estimated that she was traveling between ten and fifteen miles per hour at the time she experienced loss of directional control.

Mrs. Arbuckle's experience demonstrated that whether or not separation normally occurs in such ordinary driving maneuvers as making a right turn, it did occur in this situation, raising experientially, rather than scientifically (as when done by the metallurgy experts), the question of whether pitman arm failures constitutes an unreasonable risk to safety.[14]

GM countered the experience of Mrs. Arbuckle with the risk analysis of Dr. Tetelman. Risk analysis is based upon the premise, recognized by engineers, that no event has zero probability and no product can be perfectly safe. Arbuckle-type experiences are bound to occur. Risk analysis attempts to put these experiences in perspective, however, by quantifying the safety record of an item (in this case, the pitman arm on 1959-1960 Cadillacs) so that it may be compared with other items, thereby determining whether it presents an unreasonable risk to safety.

In the case of these Cadillacs, there is no documented injury or death resulting from pitman arm failure, as NHTSA has admitted. Furthermore there are few documented accidents. The cars are now fifteen years old. 96% of their life had been completed by the end of 1973. At the start of 1975 there were approximately 33,000 still in service. And the vehicles have travelled, in the aggregate, approximately 24 billion miles. On the basis of this extensive

[14]Testimony of another pitman arm failure was offerd by the deposition of Joseph Dalkiewicz of Plymouth, Pennsylvania. However, the diagram of the direction taken by the Dalkiewicz vehicle after the pitman arm failure was contrary to the evidence of Dr. Weiss, thus weaking the force and effect of the evidence.

past experience, Dr. Tetelman projected a negligible risk of accidents, injuries or death due to pitman arm failure in the extremely limited future that remains for these automobiles.[15]

He noted that there is little likelihood of a rash of pitman arm failures in the remaining four per cent of the life of these vehicles because the mean (average) fatigue life of the pitman arm is calculated to be approximately 48 years, whereas the significant life remaining in these Cadillacs is only six years.

Therefore the government's demonstration that the Arbuckle-type experience has happened did not prove that it would happen sufficiently often to create an unreasonable risk to safety. On the contrary, GM offered Dr. Tetelman's risk analysis as evidence that it will not.

III. Finding of Fact.

The government failed to demonstrate that a defect which creates an unreasonable risk of accidents, injury or death exists in the pitman arms of model year 1959-1960 Cadillacs.

IV. Conclusions of Law.

1. The United States, as plaintiff, failed to bear its burden of showing by a preponderance of the evidence that fatigue-induced failure of the pitman arm in 1959-1960 model year Cadillacs creates an *unreasonable* risk of accidents, injuries, or deaths.

2. Therefore this defect in the pitman arm in 1959-1960 model year Cadillacs is not a "defect which relates to motor vehicle safety" under Section 113(c)(2) of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. § 1402(e)(2)).

[15]Dr. Tetelman used other data as well, but the Court relies on that portion of his analysis which is based on the life history of these automobiles.

3. The Order of the Administrator of the National Highway Traffic Safety Administration of January 10, 1974 ordering General Motors to furnish the defect notification specified in Section 113(e) to owners of the Cadillacs involved as provided in Section 113(a) and (b) is set aside.

OLIVER GASCH
Judge

April 25, 1975

Date

No. 77-521

In the Supreme Court of the United States

OCTOBER TERM, 1977

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-34a) is reported at 561 F.2d 923. The opinion of the district court denying cross-motions for summary judgment (Pet. App. D, pp. 38a-47a) is reported at 65 F.R.D. 115. The post-trial memorandum of findings and conclusions of the district court (Pet. App. E, pp. 48a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1977 (Pet. App. B, p. 35a). A timely petition for rehearing was denied on August 18, 1977 (Pet. App. C, pp. 36a, 37a). The petition for a writ of certiorari was filed on October 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Where the existence of a defect in thousands of cars is conceded, and the defect is known to cause sudden and total loss of steering control, may summary judgment be had on the question whether the defect "relates to motor vehicle safety" within the meaning of the National Traffic and Motor Vehicle Safety Act of 1966.

STATUTES INVOLVED

The National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, as amended, 15 U.S.C. (and Supp. V) 1381 *et seq.*,[1] provides in pertinent part:

15 U.S.C. 1381.

> Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines

[1] In 1974, after the administrative order reviewed by the courts below was issued, the Act was amended in respects not pertinent here.

> that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

15 U.S.C. 1391.

As used in this subchapter—

> (1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

15 U.S.C. (Supp. V) 1401(a)(3).

* * * * *

> (B) As used in this subsection, "motor vehicle accident" means an occurrence associated with the maintenance, use, or operation of a motor vehicle or item of motor vehicle equipment in or as a result of which any person suffers death or personal injury, or in which there is property damage.

15 U.S.C. (Supp. V) 1412.

> (a) If through testing, inspection, investigation, or research carried out pursuant to this chapter, or examination of communications under

section 1418(a)(1) of this title, or otherwise, the Secretary determines that any motor vehicle or item of replacement equipment—

* * * * *

(2) contains a defect which relates to motor vehicle safety;

he shall immediately notify the manufacturer of such motor vehicle or item of replacement equipment of such determination, and shall publish notice of such determination in the Federal Register. The notification to the manufacturer shall include all information upon which the determination of the Secretary is based. Such notification (including such information) shall be available to any interested person, subject to section 1418(a)(2)(B) of this title. The Secretary shall afford such manufacturer an opportunity to present data, views, and arguments to establish that there is no defect or failure to comply or that the alleged defect does not affect motor vehicle safety; and shall afford other interested persons an opportunity to present data, views, and arguments respecting the determination of the Secretary.

STATEMENT

1. The National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, as amended, 15 U.S.C. (and Supp. V) 1381 *et seq.*, authorizes the Secretary of Transportation, *inter alia*, to direct the manufacturer of a motor vehicle to notify purchasers of the vehicle if the Secretary determines that it "contains a defect which relates to motor vehicle safety." 15 U.S.C.

(Supp. V) 1412(a)(2). If the manufacturer fails to notify the purchasers of the vehicle as directed, the United States may bring an enforcement action in federal district court seeking compliance with the order and the imposition of a civil penalty. 15 U.S.C. (Supp. V) 1398(a) and 1399(a). In the enforcement proceeding, the question whether the vehicle contains a "defect" related to "motor vehicle safety" is determined by the district court. See *United States* v. *General Motors Corp.*, 518 F. 2d 420, 438 (C.A. D.C.).

The term "defect" is defined in the Act as "any defect in performance, construction, components, or materials, in motor vehicles * * *." 15 U.S.C. 1391(11). In this enforcement proceeding brought against petitioner, there is no longer any dispute that the failure of the "steering pitman arm" in the motor vehicle in question is a "defect" within the meaning of the Act. The issue in this case rather involves whether this particular defect relates to "motor vehicle safety," *i.e.*, whether it relates to "the performance of motor vehicles * * * in such a manner that the public is protected against unreasonable risk of accidents * * *." 15 U.S.C. 1391(1).

2. During model years 1959 and 1960, petitioner General Motors Corporation manufactured for sale 284,456 Cadillac cars, approximately 43,400 of which were still in service when this action began (App. 571).[2] Each of these cars was equipped with a "steer-

[2] The designation "App." refers to the joint appendix filed in the court of appeals.

ing pitman arm" whose expected life was 48 years (App. 443). "The pitman arm is a critical component of the steering system. It transfers the angular motion of the steering wheel and shaft to lateral movement of the drag link and tie rods which turn the front wheels. When the pitman arm fails, steering control is suddenly lost" (Pet. App. A, p. 4a).

In 1972, the National Highway Traffic Safety Administration, which is charged with carrying out the responsibilities of the Secretary of Transportation under the Safety Act, received consumer complaints alleging sudden pitman arm failure and sudden loss of steering control in 1959-1960 Cadillacs (Pet. App. A, p. 4a). The Administration decided to investigate the complaints and asked petitioner for information about the pitman arm in 1959-1960 Cadillacs (*ibid.*). Petitioner advised the Administration that as of September 1972 it had sold approximately six times as many replacement pitman arms to its dealers for 1959-1960 Cadillacs as for prior and subsequent years' models and that it did "not have information providing a reason for this difference" in replacement sales (Gov't Exh. 4, tab 24, pp. 37-38).[3] Furthermore, petitioner advised the Administration that on June 10, 1960, it changed the design specifications for the

[3] The actual figures were (Pet. App. A, p. 5a n. 3):

Model Year	Pitman Arms
1957-1958	4,519
1959-1960	26,424
1961-1962	4,423

pitman arm in order "'to improve performance'" (Pet. App. A, p. 5a).

During the next several months the Administration requested and obtained additional information from petitioner and investigated some of the consumer complaints alleging pitman arm failure (Pet. App. A, p. 5a). The Administration also hired a private testing company to examine the pitman arm of a 1959-1960 Cadillac manufactured before June 10, 1960 (Gov't Exh. 3, tab 15). As a result of these efforts, the Administration learned that the pitman arm in 1959-1960 Cadillacs manufactured before June 10, 1960, was subject to "fatiguing" under heavy loads, *i.e.*, cracks developed in the pitman arm when the steering wheel was turned to the full extreme, and that the "fatiguing" process ultimately caused the pitman arm to break into two pieces, resulting in sudden and total loss of steering control (*ibid.*).

In September 1973, the Administration informed petitioner that it had found "that the pitman arm on 1959 and 1960 Cadillacs is subject to sudden and catastrophic failure resulting in a loss of steering control," and that it had reached an initial determination "that a defect which relates to motor vehicle safety exists with respect to these 1959 and 1960 Cadillacs" (App. 597-598). The next month the Administration conducted a public hearing on the matter, in which petitioner participated (Pet. App. A, p. 5a). Finally, after carefully reviewing its entire file, the Administrator notified petitioner on January 10, 1974, that he had determined that "a defect

which relates to motor vehicle safety exists with respect to the steering pitman arm on 1959-1960 model year Cadillac automobiles, in that these pitman arms are subject to sudden, and catastrophic failure, causing loss of steering control, and resulting in an unreasonable risk of accidents, deaths, and injuries to persons using the highways" (*ibid.*). The Administrator directed petitioner to notify owners of the affected Cadillacs of the safety-related defect and urged petitioner to recall the cars for pitman arm replacement at its expense (Pet. App. A, pp. 5a-6a).[4]

Instead of notifying the affected owners of the pitman arm defect, petitioner filed suit the next day, January 11, 1974, to set aside the Administrator's order. The government filed suit one month later to enforce the Administrator's order. The two cases were consolidated in the United States District Court for the District of Columbia (Pet. App. A, p. 7a).[5]

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[4] At the time the Administrator issued his order, the Safety Act required only notification of safety-related defects, not free replacement. 15 U.S.C. (1970 ed.) 1402(e). The Act as amended now requires both. 15 U.S.C. (Supp. V) 1412(b).

[5] Petitioner had filed its suit in the United States District Court for the Eastern District of Michigan (Pet. App. A, p. 6a). The district court immediately issued a temporary restraining order against enforcement of the Administrator's order but later vacated the temporary restraining order and denied a preliminary injunction (*ibid.*). Later the court transferred the suit to the United States District Court for the District of Columbia, where it was consolidated with the government's enforcement action (Pet. App. A, p. 7a).

3. On March 5, 1974, the government moved for summary judgment (App. 33-34).[6] The government filed the entire administrative record and contended that on the basis of the abnormally and inexplicably high replacement sales for pitman arms in 1959-1960 Cadillacs, the results of testing by a private company, and other uncontradicted evidence, it was clear that these Cadillacs contained a "defect" within the meaning of the Safety Act. Furthermore, the government contended that since this defect caused sudden and total loss of steering control, the defect "relate[d] to motor vehicle safety" within the meaning of the Safety Act.

The district court denied the government's motion for summary judgment (Pet. App. D, pp. 38a-47a).[7] The court agreed with the government's first contention, that the Cadillacs contained a "defect" within the meaning of the Safety Act (Pet. App. D, p. 42a).[8] The court also acknowledged that "[t]here is a certain appeal to the government's argument that a defect which may result in a loss of steering control is, *ipso facto*, a safety-related defect under the Act. One need only ask whether he would consider loss of steering control, even at a very slow speed, a reasonable or unreasonable risk" (Pet. App. D, p. 45a). Nonethe-

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[6] Petitioner subsequently moved for summary judgment as well (App. 47-48).

[7] The district court also denied petitioner's motion for summary judgment (Pet. App. D, pp. 45a-46a).

[8] The district court concluded that "[t]he test results are sufficient to indicate such a defect" (Pet. App. D, p. 42a).

less, the district court ruled that the safety-relatedness of the defect in these Cadillacs necessarily was an issue of fact, and it ordered a trial (*ibid.*).

At trial the government presented expert testimony on the danger of sudden loss of steering, at low, moderate, and high speeds, and it also presented expert testimony to establish that pitman arm failure could occur at any speed (App. 119-137, 153-171, 186-212, 224-255). In this regard, the government presented, *inter alia*, the testimony of a driver who had experienced sudden loss of steering in a 1960 Cadillac due to pitman arm failure while making a right-hand turn at 10 to 15 miles per hour (Pet. App. D, pp. 55a-56a).[9]

Petitioner announced at trial that it would not contest the district court's prior finding of "defect" in the 1959-1960 model year Cadillacs (App. 113). However, it offered testimony that pitman arm failure could occur essentially only during low speed manuevers (such as five mile-per-hour "U-turns," which subject the pitman arm to high stress from the full turn of the steering wheel), and a prediction that during the continued life of 1959-1960 Cadillacs loss of steering control due to pitman arm failure would not be dangerous (Pet. App. D, pp. 56a-57a).

[9] As the district court summarized this driver's experience, "the steering on her 1960 Cadillac failed without warning as she was making a right hand turn, and her vehicle proceeded diagonally into the curb on the opposite side of the street into which she was turning. Fortunately the oncoming traffic lane was empty so there was no collision" (Pet. App. D, pp. 55a-56a).

The district court found that the parties' testimony concerning pitman arm failure at moderate or high speeds to be a "stand-off" (Pet. App. D, p. 55a). It also found that the government's evidence of past pitman arm failure to be offset by petitioner's prediction that future loss of steering control due to pitman arm failure would not be dangerous (Pet. App. D, pp. 56a-57a). On the basis of these findings, the district court concluded that the government had not carried its burden of showing by a preponderance of the evidence that the defect in 1959-1960 Cadillacs was safety-related within the meaning of the Safety Act, and it set aside the Administrator's order (Pet. App. D, pp. 57a-58a).

4. The court of appeals, with one judge dissenting in part, reversed the district court's denial of the government's motion for summary judgment and remanded for determination of the appropriate sanction. The majority pointed out, in a brief *per curiam* opinion, that "[t]he evidence is uncontradicted that General Motors sold six times as many pitman arm replacement [*sic*] for the 1959-60 Cadillac models as for adjacent model years; that steering pitman arm failures have occurred while these models were being driven; and that when the steering pitman arm fails, the driver loses control of the car" (Pet. App. A, p. 2a). The court held that under the Safety Act, "these uncontradicted facts" demonstrated that the admitted defect in 1959-1960 Cadillacs was safety-related (*ibid.*).

In an opinion dissenting in part and concurring in part, Judge Leventhal also expressed the view that the judgment of the district court should have been reversed, but because of errors of law in the post-trial opinion rather than because of its denial of summary judgment (Pet. App. A, pp. 15a-16a, 32a). He concluded that the district court's post-trial opinion reflected "an incorrect allocation of the burden of proof," and that "[a]pplication of the correct standard" showed that the evidence presented by petitioner "is incapable of carrying GM's burden of rebuttal" (Pet. App. A, p. 32a).

ARGUMENT

The court of appeals correctly held that summary judgment was appropriate in the circumstances of this case. That holding, which was based upon the unique nature of the defect involved in this particular case, states no rule of general applicability and does not warrant review by this Court.

Contrary to petitioner's contention (Pet. 13-15), the court of appeals has not adopted a "*per se* rule" precluding a manufacturer from introducing evidence on the question whether a known defect relates to "motor vehicle safety" within the meaning of the Safety Act. The court of appeals simply rejected the notion, underlying the district court's first opinion and expressed here by petitioner, that district courts have an "obligation" in all Safety Act cases "to conduct a *de novo* trial" on the issue of safety-relatedness (Pet. 14). There may be cases in which a

full trial will be necessary. But in a case such as this, where the existence of a defect in thousands of cars is conceded, the incidence of defect is shown by undisputed facts to be approximately six times greater than for other car models, and the defect is known to cause sudden and complete loss of steering control, summary judgment on the question whether the defect "relates to motor vehicle safety" plainly is proper.[10] Since the government's uncontested allegations established that the defect was present for only two model years, it was inferrable that the defect was readily correctable (an inference petitioner has not disputed). In these circumstances, the risk of accident or injury posed by this substantial steering defect clearly was not "reasonable."

Petitioner is wrong to suggest that review of the court of appeals' decision is warranted because the court's opinion does not "articulat[e] meaningful standards to guide the district courts in other cases"

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[10] The court of appeals emphasized the importance of the availability of summary judgment in an earlier Safety Act case, *United States* v. *General Motors Corp.*, *supra*, 518 F. 2d at 441 (footnotes omitted):

> This court has recognized the "important function" served by summary judgment in avoiding "long and expensive litigation" and "curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement." The vital role played by the summary judgment procedure is heightened in cases where the prospect of a lengthy trial itself endangers the effective vindication of the fundamental interests at issue. In defect notification enforcement actions, such delay may lead to needless deaths and injuries. * * *

(Pet. 15). The question whether a defect relates to motor vehicle safety necessarily turns on the nature of the particular defect. In this case, the court of appeals simply concluded that the "uncontradicted facts demonstrate an 'unreasonable risk of accidents' stemming from the defect" (Pet. App. A, p. 2a). There was no occasion, in this case of first impression, for the premature enunciation of generalizable standards for applying the statutory language to all defects. The task of evolving such standards was appropriately left to case-by-case adjudication. In any event, failure to state a precedentially significant rule hardly is ground for review on certiorari by this Court.

Petitioner asserts that the decision of the court of appeals "raises significant due process problems" because it may affect the ability of manufacturers to obtain preliminary injunctions against enforcement orders and thereby toll the accrual of a statutory penalty.[11] There is no constitutional problem. If, as petitioner apparently believes, the decision below stands for an interpretation of the statute that is

[11] A manufacturer that refuses to comply with an enforcement order is subject to a civil penalty. 15 U.S.C. (1970 ed. and Supp. V) 1398. But a district court may toll the accrual of the penalty by granting a preliminary injunction. 15 U.S.C. (Supp. V) 1415(c)(1). These provisions were sustained as constitutional in *Ford Motor Co.* v. *Coleman*, 402 F. Supp. 475 (D. D.C.), affirmed, 425 U.S. 927. Such preliminary injunctions have issued in *United States* v. *Ford Motor Co.*, No. 76-29 (D. D.C.), and *United States* v. *Ford Motor Co.*, 421 F. Supp. 1239 (D. D.C.), appeals pending, C.A. D.C., Nos. 76-2062, 76-2063, 77-1378.

unfavorable to manufacturers, any difficulty they would have in obtaining preliminary injunctions would simply reflect the balance of legal factors that relate to a finding of probable success on the merits. But since, as petitioner itself argues (Pet. 15), the decision below does not purport to set standards for adjudicating future cases (other than to emphasize that adjudications must rest upon the particular defect involved in each case), there is no basis for any speculation concerning the ability of manufacturers in the future to avoid the statutory penalties for refusal to comply with enforcement orders.[12] Such speculation affords no ground for review of this case.[13]

[12] Petitioner itself was not faced with the problem it raises, because the special statutory provision for tolling the accrual of the penalty during litigation was not enacted until after this action commenced.

[13] There was no disagreement among the panel members of the court of appeals that the district court erred in entering judgment against the government. Although he dissented in part from the *per curiam* opinion, Judge Leventhal concluded that the district court's decision was based upon an incorrect allocation of the burden of proof (Pet. App. A, pp. 21a-26a, 31a-32a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-521

GENERAL MOTORS CORPORATION, PETITIONER,

v.

UNITED STATES OF AMERICA, et al.

Brief of Volkswagenwerk, AG and Volkswagen of America, Inc. in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Introduction and Statement of Interest of *Amicus Curiae*

This brief, filed pursuant to written consents obtained from the parties as required by Rule 42 of this Court, is submitted by Volkswagenwerk, AG ("VWAG") and Volkswagen of America, Inc. ("VWoA") as *Amicus Curiae* in general support of petitioner, General Motors Corporation.

VWAG, a corporation organized and existing under the laws of the Federal Republic of Germany, is the manufacturer of Volkswagen vehicles. VWoA, a New Jersey corporation, is the authorized importer of Volkswagen vehicles into the United States. Numerous Volkswagen automobiles, both new and old, are owned and used in the United States.

Both VWAG and VWoA (sometimes collectively referred to herein as "Volkswagen") have a real and vital

interest in filing a brief *amicus curiae* in opposition to the decision below. That decision applies and construes key provisions of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* (1970) (amended 1974) (hereinafter "the Safety Act"), as well as evidentiary considerations related to such provisions. As a manufacturer of motor vehicles subject to the Safety Act, VWAG is vitally affected by judicial pronouncements regarding the scope and breadth of the Act and enforcement thereof.

Despite more than a decade of Safety Act operation, this Court has, apparently, on only one occasion reviewed the Act's enforcement[1] and upon issues different from those presented herein. The non-unanimous decision below involves statutory construction of critical definitions of "defect," "motor vehicle safety" and "unreasonable risks" which lie at the heart of Safety Act enforcement. Curiously, the decision below includes a lengthy dissenting opinion which the "per curiam" majority professes to agree "with much of."[2] Yet the areas of agreement remain unidentified. Moreover, the dissenting opinion, characterized as "scholarly" by the majority, attempts to suggest guidelines for the trial of cases likely to affect numerous litigants who are not party to the instant case:

> "[T]he import of my disagreement with the majority has more to do with the doctrine we establish for governance of this type of case in the future than the result in the case of the 1959-1960 Cadillacs." [3]

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[1] *Ford Motor Co.* v. *Coleman*, 402 F.Supp. 475 (D.D.C. 1975), *aff'd mem.*, 425 U.S. 927 (1976).

[2] Judge Leventhal, who authored the dissent below was also author of the Circuit Court's opinion in *United States* v. *General Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975) (Wheels) as well as the majority opinion in *Ford Motor Co.* v. *Coleman*, *supra* n. 1.

[3] Decision below, *United States* v. *General Motors*, 561 F.2d 923, 938 (D.C. Cir. 1977) (dissenting opinion).

Thus, it is evident that manufacturers other than General Motors are materially affected by the nature of the precedent developed below. Even the dissent's elaborate consideration of guidelines for adjudication in such cases merits review. It is at least arguable that neither the majority nor the dissent correctly construe and apply the relevant statutory provisions. It remains for this Court to resolve a real conflict and set forth criteria which enable litgation under the Act to proceed in a fair and constitutionally appropriate manner.

For Volkswagen and other manufacturers it is evident that clarification is needed in this undefined area. Manufacturers need to know in advance what legal standards and evidentiary criteria will be applied to "defect" inquiries so that they can make reasoned decisions whether litigation is necessary. At the same time, the Agency needs to have appropriate guidelines so that frivolous, marginal, costly and time-consuming litigation or administrative "over-zealousness" can be minimized. The trial and appellate courts need guidance on how to balance the competing interests and assure due process within the statutory framework.

The decision below does not clarify; it confuses. It suggests that a conflicting trial record, replete with reasoned technical testimony by competent experts and which raises material issues of fact, can be ignored in favor of summary judgment. It undercuts the legislative intent that there be an actual trial *de novo* rather than a cursory overview, via motion practice, of an informal administrative record. It conflicts with the statutory policy that there be a full, fair, adversarial proceeding rather than a summary judicial disposition upon only selected facts.

Perhaps more importantly, the opinion below creates an unhealthy climate of uncertainty and the potential for

Agency intimidation or "overzealousness" in an area which requires a rational balancing of many complex variables and competing interests. Manufacturers do not know what key definitional provisions mean and lawyers cannot advise their clients with confidence as to a predictable outcome. Accordingly, Volkswagen submits this brief as *amicus curiae* to urge this Court to accept review of this matter for the purpose of dissipating the confusion engendered by the decision below and to consider all policy ramifications bearing upon the issues.

ARGUMENT

I.

The "Safety Related Defect" and "Unreasonable Risk" Issues in The Context of Traffic Accident Causation and Injury Minimization Are Complex and Ordinarily Not Susceptible To Summary Determinations.

The question of causation of traffic accidents and resulting injuries and fatalities involves complex, interrelating variables often operative, sometimes in subtle ways. One thing is clear. The general cause of traffic-related injuries cannot be laid solely at the automobile manufacturer's door step.

An automobile operated under given circumstances is, by its nature, a product whose use the manufacturer cannot control. The drivers alone determine the speeds at which their cars will travel, the turns to be made, the proximity to other cars or objects on the roadway, the perception time required for emergency response, etc. Once the vehicle is being driven, its safe operation is almost entirely dependent upon the driver's behavior and that of others around him. Experience indicates that the capability for entirely independent action by a driver—the very functional feature which makes automobiles so indispensable to a modern economy—is also a primary cause of considerable tragedy.

> "It is obvious, of course, that automobiles are unhappily and almost continuously colliding with other motor vehicles, with trees, with culverts, with locomotives, and with every imaginable type object, either moving or fixed; that they are, indeed, driven off bridges, driven into water, and driven over cliffs. They are, in fact, involved in collisions of limitless variety." *Yetter* v. *Rajeski,* 364 F.Supp. 105, 108 (D.N.J. 1973).

Nearly every accident situation involving an automobile, "no matter how bizarre" is foreseeable "if only because in the last fifty years drivers have discovered just about every conceivable way of wrecking an automobile." *Dreisonstok* v. *Volkswagenwerk, A.G.,* 489 F.2d 1066, 1970 (4th Cir. 1974). Given the limitless variety of conditions under which automobile accidents occur, in terms of, for example, impact speed, direction and location of impact, accident severity, etc., it simply is not fair in "defect" cases to eliminate from the fact-finder's consideration appropriate evidence on all factors related to accident or injury causation.

The results of a recently published study on the causes of automobile accidents conducted for the U.S. Department of Transportation by Indiana University's Institute for Research in Public Safety [4] are instructive. The multi-

[4] Final Report, *Tri-level Study of the Causes of Traffic Accidents,* Volume I—Research Findings, Report No. DOT HS—801 334 (January 1975) (hereinafter called "Indiana Study").

disciplinary accident investigation group[5] evaluated accidents to determine whether they were caused by human factors, environmental factors, or vehicle factors. It was found that human factors acting alone were the predominant cause of accidents.[6] Human and environmental factors in combination generally ranked second.[7] Vehicular factors were identified as the lowest cause of accidents.[8] The results of the study "underscore the overwhelming influence of human factors in automobile accident causation. Even where vehicular and environmental factors are causally involved, it is generally in combination with a human failure."[9] The study also states:

> "Accidents caused by manufacturing defects and catastrophic mechanical failures have been found to be very infrequent occurrences. The top-ranking vehicle factors * * * generally resulted from improper maintenance."[10]

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[5] "Multidisciplinary" accident research refers to a systematic aproach to intensive accident investigation wherein the participant investigators come from different disciplines so as to permit in-depth expert evaluation of accident causes. In the Indiana Study the members of the "in-depth" team included a sociologist, a traffic engineer, a reconstruction specialist, an automotive engineer, a mechanic, and an engineering assistant/technical writer. Indiana Study, at p. 7.

[6] Indiana Study, at p. 19. Examples of human factors are dozing, blacking out, recognition errors, decision errors, improper driving, etc. Id. at pp. 26-27.

[7] Indiana Study, at p. 19. Examples of environmental factors are slick roads, inadequate signs and signals, view obstructions, highway design problems, highway maintenance problems, weather changes, etc. Id. at pp. 27-28.

[8] Indiana Study, at p. 44. Vehicular factors include tires and wheels, brake system, steering system, suspension problems, power train and exhaust, communications system, etc. Id. at p. 28.

[9] Indiana Study, at p. 24. It should be noted that even in the category denominated as "vehicular factors" there exists the potential for a significant human element. Thus, for example, such systems as brakes and tires require inspection and maintenance by the user in order to assure proper performance.

[10] Indiana Study, at p. 51. Of course, failure of a product user to maintain the product, where such lack of maintenance causes or contributes to causing the injurious event, is a form of human fault.

In its summary, the Government's own Indiana Study articulates the need to properly educate drivers, the principal cause of automobile accidents.[11]

The Government's own annual report on the administration of the Safety Act noted that in 1974 fatalities decreased in one year by over 16 percent "as a result of the energy crisis of late 1973, and the consequent imposition of a national maximum speed limit of 55 miles per hour . . ."[12]

It is, of course, a matter of common knowledge that alcohol impairment and other human factors play a most significant role in accident causation and collision severity. In the Government's own words,

> "Many factors contribute to the occurrence and seriousness of motor vehicle accidents. They operate in complex ways that make it difficult to determine the beneficial effect of a specific safety program or

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[11] Indiana Study, at p. 52:

> "These results indicate that we must ensure that drivers always look for traffic when entering intersections, and do so carefully enough that they will accurately detect oncoming traffic. We must ensure that drivers monitor traffic ahead at a rate sufficient to ensure that sudden stops do not result in collision, and must also ensure that drivers monitor road signs and signals at an adequate rate. Finally, we must enable drivers to recognize the safe maximum travel speed for various road configurations, and induce them to be unwilling to accept the risk of traveling faster. In summary, we must ensure that drivers are aware of the danger cues in the driving environment, and can acquire and recognize these amidst all of the other information that is continually bombarding the driver."

[12] U.S. Dep't of Transportation, *Traffic Safety '76: A Report by the President On the Administration of the National Traffic & Motor Vehicle Safety Act of 1966, As Amended*, p. 1 (Jan. 1, 1976—Dec. 31, 1976). The report noted that "approximately 50 percent of the 9,000 lives saved annually may be attributed to a continuation of the 55-mph national maximum speed limit." Id. at p. 1. The report quoted the observation of the President of the United States, "It is difficult to escape the obvious conclusion that the Nation's highways are safer now than they were when the speed limit was higher." *Ibid.*

device initiated by the NHTSA to reduce fatalities and injuries.'"[13]

Against the backdrop of these complex, interrelating variables, many of them not within the control of automobile manufacturers, it is inappropriate to sanction "defect" determinations, often involving older cars, in a summary, *per se* fashion as the court below did.

Both the majority and dissenting opinions emphasized as influential factors statistical "evidence" concerning "other accidents." While other occurrences may be relevant to the inquiry, they need not in a given case be determinative. Other accidents or occurrences may only be arguably suggestive of mechanical problems. The only fair way to determine the significance of this kind of proof, if any, is to establish by competent, probative evidence in a fully litigated trial whether such occurrences are relevant and, if so, the weight to be attached to them in the context of other relevant considerations. The summary, presumptive approach taken by both the majority and dissenting judges is too restrictive in light of what is known about the complexity of accident causation. If a "statistical game" is to be the central focus of a *de novo* "defect" trial, then each and every occurrence that makes up the statistical base has to be scrutinized for the proper foundation, accuracy of underlying information and probative effect.

When a factual dispute is presented via legitimate, qualified expert testimony as to the underlying statistics and their significance, as well as the scientific and engineering questions of "defectiveness" or "unreasonable risks," the matter is plainly inappropriate for summary adjudication. The whole premise of trial *de novo* is a full and fair

[13] U.S. Dep't of Transportation, Traffic Safety '76, *supra* n. 12, at 2.

opportunity to litigate the issues before an impartial fact finder in accordance with due process. The majority below swept away the legitimate factual conflict and substituted its own notion of "unreasonable risk." The dissent, though more sensitive to the statutory mandate for a full trial, also indulged in structuring "presumptions" and "burdens of proof" which could, in future cases, inhibit the manufacturer's ability to litigate fully and fairly the "defect" and "unreasonable risk" issues.

If so significant and sweeping a gloss is to be placed upon key provisions of the Safety Act, it should be effected by this Court only after consideration of all the competing policy ramifications and following the submission of full briefs by the litigants and interested parties.

II.

"Safety Related Defect" Litigation Under The Act Will Have Enormous and Potentially Irreparable Products Liability Implications in Private Civil Suits, A Factor Mandating that "Defect" Determinations Be Based Upon A Full, Fair and Impartial Trial *De Novo* Rather Than Summary Judgments.

Private civil litigation involving injuries attributable to use of products, commonly known as "products liability," has mushroomed.[14] The Interagency Task Force on Product Liability (hereinafter "Task Force"),[15] chaired by the

[14] See generally, Hoenig, *Products Liability Problems and Proposed Reforms,* Insurance L.J., No. 651, p. 213 (April 1977).

[15] The Task Force was established in April 1976 by the President's Economic Policy Board to conduct a study of the impact of products liability claims on the economy. Aside from the Commerce Department, participants included other Government agencies. The Department of Justice provided assistance.

Under Secretary of Commerce, found that the "rate of increase in products liability claims appears to have been rising in excess of the rate of increase in actual product injuries."[16] The Task Force found that products liability law has become "filled with uncertainties creating a lottery for both insurance rate makers and injured parties."[17] Amid the mushrooming case load are reports of astronomical verdicts and settlements, even in the million dollar category and beyond.[18]

The automobile industry has been inundated with products liability litigation involving the extensive use of automobiles upon the Nation's highways. Such suits range from claims that defects allegedly caused accidents to claims that defects failed to minimize injuries in accidents caused by others. Suits have involved claims, for example, that small cars were not "crashworthy" when impacted by moving railroad trains;[19] that cars are defective because they can be driven into others too fast;[20] that a bell or alarm should have been installed in a four-year-old car to warn the driver when his brake fluid leaked;[21] that an ignition

[16] Interagency Task Force on Product Liability, *Briefing Report (Executive Summary)*, at p.ii (Jan. 1, 1977) (hereinafter "Task Force Report").

[17] Task Force Report, *supra* n. 16, at p. iii.

[18] See Hoenig, *supra* n. 14, Insurance L.J., No. 651, at pp. 226-230.

[19] *E.g., Alexander* v. *Seaboard Air Line R.R.*, 346 F.Supp. 320 (W.D. N.C. 1971), *aff'd*, CCH Products Liability Reports ¶ 6748 (4th Cir. 1972) (collision with 114-ton locomotive engine); *Li Puma* v. *County of Rockland*, 81 Misc.2d 988, 367 N.Y.S.2d 149 (Sup.Ct. 1975) (collision of 4,000-ton freight train with school bus); *Walz* v. *Erie-Lackawanna R.R.*, CCH Products Liability Reports ¶ 5722 (N.D. Ind. 1967).

[20] *E.g., Schemel* v. *General Motors Corp.*, 384 F. 2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[21] *McNally* v. *Chrysler Motors Corp.*, 55 Misc.2d 128, 284 N.Y.S.2d 761 (Sup.Ct. 1967).

lock in a 1961 model automobile was defective because a drunken thief stole the car by picking the lock and drove into the side of another vehicle, injuring its occupants;[22] that a car was defective because it injured a pedestrian when it crashed into him at 25 miles-per-hour, even though the plaintiff caused the accident by crossing the street directly in front of the approaching car;[23] that a luggage rack or parcel grid located in front of the saddle of a motorcycle made the product defective because the rider was injured when he was launched forward during his collision with a car and thereby impacted the rack;[24] that an obviously unpadded dashboard on an old car was defective because it should have been padded;[25] and that a snub-nosed van vehicle was "uncrashworthy" and defective because it was not built like a standard passenger car.[26]

The potential for labelling virtually anything an alleged "defect" requires assurance that a full and fair opportunity to defend such a claim is guaranteed.

The broad ambit of suits alleging defects which cause accidents and those which allegedly enhance injuries when accidents occur coincides generally with the subject matter jurisdiction entrusted to the Administrator under the

[22] *Dean* v. *General Motors Corp.*, 301 F.Supp. 187 (E.D. La. 1969).

[23] *Baker* v. *Chrysler Corp.*, 55 Cal.App.3d 710, 127 Cal. Rptr. 745 (1976). It was not claimed that a defect in the car caused the accident, but that the pedestrian's injuries were increased during the impact because of the vehicle's design.

[24] *Bolm* v. *Triumph Corp.*, 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973).

[25] *Burkhard* v. *Short*, 28 Ohio App.2d 141, 275 N.E.2d 632 (1971).

[26] *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974).

Safety Act.[27] Thus, enforcement activities under the Act, including findings of "safety related defects" can generate the filing of innumerable claims as well as affect the course and outcome of such lawsuits.

Recently, courts have held that defect notification letters or recall notices issued by a manufacturer under the Safety Act are admissible in products liability suits. *E.g.*, *Fields* v. *Volkswagen of America, Inc.*, 555 P.2d 48 (Okla. Sup. Ct. 1976); *Barry* v. *Manglass*, 55 A.D. 2d 1, 389 N.Y.S. 2d 870 (2d Dep't 1976); *Manieri* v. *Volkswagenwerk, A.G.*, CCH Products Liability Reports ¶ 8006 (N.J. App. Div. 1977); *Farner* v. *Paccar, Inc.*, CCH Products Liability Reports ¶ 8015 (8th Cir. 1977). In such cases the notice is sometimes viewed as tantamount to an admission of product "defectiveness." Because, however, the manufacturer is compelled by the Safety Act to send these letters, with which it and numerous engineering experts may disagree, and because the language contained in such notices must refer to the existence of a "defect," admissibility of such a notification in a products liability suit will obviously impair the ability of a manufacturer to defend such a claim. Since verdict potential in a single, given case can be very high,[28] and since claims attributable to a particular car model can be numerous, the potential exposure to a manufacturer of a "safety related defect" finding can be astronomical. This would be in addition to the recall expense and penalty, if any, deriving from Safety Act enforcement.

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[27] See *e.g.*, 15 U.S.C. § 1391(1) (protection "against unreasonable risk of accidents occurring" and "against unreasonable risk of death or injury to persons in the event accidents do occur").

[28] *E.g.*, *Huddell* v. *Levin*, 537 F.2d 726 (3d Cir. 1976) (reversing two million dollar verdict in death claim for legal errors).

The finding of a "safety related defect," either by the Agency or by a court, will potentially have a kind of *de facto* "collateral estoppel" effect upon numerous products liability lawsuits. It will also generate the filing of numerous claims. Thus, it will be seen that the importance of "defect" litigation under the Safety Act transcends the particular policy considerations of the Act itself. At stake are due process ramifications in countless lawsuits all over the country.

In the face of this potential for irreparable injury, a manufacturer must be assured that its trial *de novo* rights under the Safety Act are fully preserved and that summary determinations are not made when a legitimate factual and technical conflict exists over whether there is a "defect" and whether it presents an "unreasonable risk." Such "defect" litigation has vast precedential effect and it is wholly inappropriate to have determinations made on a *per se*, presumptive or summary basis.

The significance of this question to manufacturers; lawyers who must advise their clients; trial and appellate judges who must decide such cases; the Agency; and consumers is so paramount that only full review by this Court will suffice to dispel uncertainty.

Conclusion

For the foregoing reasons, Volkswagen submits that a writ of certiorari should issue in this case and that full review of the policy considerations be undertaken upon full briefs by the litigants and interested parties.

Dated: November 1977

Respectfully submitted,

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No. 77-521

In the Supreme Court of the United States

OCTOBER TERM, 1977

GENERAL MOTORS CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY MEMORANDUM OF PETITIONER GENERAL MOTORS CORPORATION

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REPLY MEMORANDUM OF PETITIONER GENERAL MOTORS CORPORATION

The Brief in Opposition resorts to the familiar device of arguing that petitioner seeks review of the application of settled summary judgment principles to particular facts. The Brief in Opposition also asserts that the decision below has not adopted a "*per se* rule" and "states no rule of general applicability" that warrants review (Opp. at 12). Both arguments are wrong and require this brief Reply. As we demonstrated in our Petition for Certiorari, this case squarely presents an important question of statutory interpretation that will effectively determine the scope of the motor vehicle recall provisions of the National Traffic and Motor Vehicle Safety Act of 1966, as amended ("Safety Act"), 15 U.S.C. § 1381 *et seq.*

And, contrary to the Solicitor General's suggestion that this case will have no impact on other Safety Act cases, the court of appeals and the Justice Department itself are already treating the decision below as a decision having *per se* application and preclusive precedential significance on the issue of "unreasonable risk." [1]

1. The government has not challenged our statement (Pet. 13-14), based on the legislative history of the Safety Act, that by enacting the "unreasonable risk" standard, Congress intended that motor vehicle recall orders would be issued only after balancing the safety considerations against the costs of compliance in each case. But by adopting a *per se* rule that precludes a manufacturer from introducing evidence on the presence or absence of risk, the court of appeals has in effect reweighed the competing policy interests previously considered by Congress and substituted its own judgment as to the proper outcome by reading the "unreasonable risk" standard out of the statute. The action of the court of appeals exceeds the limits of the judicial role and warrants review by this Court.[2]

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[1] The submissions of *amici* in support of the Petition, which the government ignores, amply demonstrate that the effects of the decision below will be felt not only by the major domestic manufacturers, but by all members of the motor vehicle industry. Many smaller firms in the industry may not be able to afford the costs of the substantial expansion of their recall-and-repair obligations threatened by the court of appeals' decision.

[2] Apparently recognizing that the court of appeals completely ignored the balancing required by the Act, the government seeks to strike its own balance by suggesting that the costs of recall would be negligible. Thus, the respondents argue that "it was *inferrable* that the defect [in the vehicles at issue in this case] was readily correctable . . ." (Opp. at 13; emphasis added). Neither NHTSA nor either court below drew such an inference from the record. Such an inference cannot and should not be drawn for the first time in this Court. Evidence on the costs of recall is not of record, but it is in fact "inferrable" that recall of the vehicles in question would be unusually difficult because of the many practical problems engendered by the extreme age of these 1959-60 cars.

The Brief in Opposition attempts to obscure the court of appeals' revision of the statute by defending the court's result on factual grounds. In doing so, respondents apparently feel compelled to recite and rely upon their version of the facts developed at trial—after the district court had correctly held that the presence or absence of an unreasonable risk "was a matter of fact, not of supposition" (App. D, p. 45a). Thus, what respondents are really urging, although their argument purports to defend a grant of summary judgment, is that the result in this case is justifiable on the basis of the whole record. But the district court found to the contrary, and the court of appeals did not undertake a review of the whole record; rather, it held the entire trial record to be immaterial. Had the court of appeals rested its decision on the whole record, the nature and scope of its review would of necessity have been very different. (*See*, the dissenting opinion of Leventhal, J., App., p. 24a; Rule 52(a), Fed. R. Civ. P.)

2. Contrary to respondents' suggestion, the decision below already has had and will continue to have great precedential force in Safety Act cases. Unless corrected by this Court, the holding below will operate to exclude evidence on the "unreasonable risk" issue in virtually all subsequent Safety Act litigation, and the government is urging that result in other cases. As the dissenting judge correctly forecast, the holding below is so disturbing precisely because of "the doctrine [it] establish[es] for governance of this type of case in the future . . ." (App. A, p. 34a).

In the very next Safety Act case to reach the court of appeals after the instant case,[3] the court concluded that

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[3] Respondent has conceded by silence, as it must, that virtually all Safety Act cases arise in the D.C. Circuit. Under these circumstances, where there is no possibility that a conflict among the circuits will arise, review by this Court is appropriate. *See Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50 (1938); Pet. 18-19.

another type of defect in other vehicles presented a *per se* unreasonable risk under the Safety Act and observed that, "[i]ndeed, this conclusion appears to be mandated by our recent decision in [the *Pitman Arm* case]. . . ." [4] The Justice Department argued strenuously for that result, notwithstanding the Solicitor General's assertion in this Court that the decision below is *sui generis* and without general applicability. The Justice Department has in fact argued in several other pending Safety Act cases that the holding below is controlling on the issue of "unreasonable risk." [5] And while arguing in this Court that "the court of appeals has not adopted a '*per se* rule' precluding a manufacturer from introducing evidence on the question whether a known defect related to 'motor vehicle safety' within the meaning of the Safety Act" (Opp. at 12), the Justice Department is even now pressing the opposite interpretation in the lower courts.[6]

3. The use to which the courts and the Justice Department have already put the decision below wholly belies

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[4] *United States* v. *General Motors Corp.*, —— F.2d ——, D.C. Cir., Nos. 76-1744 and 76-1745 (*"Quadrajet"*), decided Oct. 14, 1977, slip. op. at 5, *aff'g in relevant part a grant of summary judgment to the government in* 417 F. Supp. 933 (D.D.C. 1976).

[5] In *United States* v. *Ford Motor Co.*, D.C. Cir. Nos. 76-2062 and 76-2063, argued Nov. 21, 1977, *on appeal from* 421 F. Supp. 1239 (D.D.C. 1976), the Department of Justice moved, on the basis of the holding in this case, that the court of appeals summarily affirm another district court decision in which summary judgment was entered against a manufacturer which had not been permitted to introduce evidence on the issue of risk. A similar motion was filed in the *Quadrajet* case, *supra*, n.4.

[6] For example, in *United States* v. *Ford Motor Co.*, C.A. No. 76-0029, another Safety Act case still pending before the United States District Court for the District of Columbia, the Justice Department has again moved for summary judgment and has argued that, by its holdings in this case and *Quadrajet*, the court of appeals has "adopt[ed] *in toto* the *per se* approach to vehicle defects that the government has advanced since the outset of this litigation." Plaintiff's Reply to the Opposition of Defendant Ford Motor Company to Plaintiff's Motion for Summary Judgment, filed Oct. 21, 1977, at 3.

the argument advanced by the government against review of this case by this Court. It is clear that the court of appeals' decision, if permitted to stand, will fundamentally change the nature of the evidentiary record compiled in all subsequent motor vehicle recall litigation and foreclose any meaningful review of administrative defect determinations. This means, as we have already pointed out (Pet. 15-16), that the record in subsequent cases will not be sufficiently developed for effective appellate review. Thus, if the scope Congress intended the Safety Act to have is ever to be determined on a fully developed record that raises all pertinent conflicting considerations, this is the case in which to do it.

CONCLUSION

For the reasons stated in the Petition and this Reply, the Petition For a Writ of Certiorari should be granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-521

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*

BRIEF OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-521

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*

BRIEF OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INTEREST OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC.

Automobile Importers of America, Inc. (AIA) is a trade association organized as a non-profit District of Columbia corporation. Its Members import into,[1] or manufacture

[1] Alfa Romeo, Inc.
BMW of North America, Inc.
[footnote continued]

for export to,[2] the United States the following makes of vehicles: Alfa Romeo, Arrow, BMW, Bentley, Challenger, Colt, Courier, Datsun, FIAT, Honda, Jaguar, Lancia, Lotus, LUV, MG, Mazda, Opel, Peugeot, Renault, Rolls-Royce, SAAB, Sapporo, Subaru, Toyota, Triumph and Volvo. The sales volumes of these vehicles range from the highest among imports to those too low to be listed among the top twenty-seven imports.[3] Associate Members[4] of AIA are manufacturers of parts for imported and domestic

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British Leyland Motors Inc.
Citroen Cars Corporation
FIAT Motors of North America, Inc.
American Honda Motor Co., Inc.
Mazda Motors of America, Inc.
Nissan Motor Corporation in U.S.A.
Peugeot Motors of America, Inc.
Renault USA, Inc.
Rolls-Royce Motors, Inc.
SAAB-SCANIA of America, Inc.
Subaru of America, Inc.
Toyota Motor Sales, U.S.A., Inc.
Volvo of America Corporation

Except for Subaru of America, Inc., these companies are wholly owned subsidiaries of the manufacturers of the vehicles they import.

[2] Isuzu Motors Limited
Lotus Cars Limited
Mitsubishi Motors Corporation

[3] Automotive News, 1977 Market Data Book Issue, p. 70

[4] Bridgestone Tire Company of America, Inc.
CEAT Representative Office, Inc.
Lucas Industries Inc
Michelin Tire Corporation
Pirelli Tire Corporation
Semperit of America, Inc.
Toyo Tire (U.S.A.) Corporation
Yokohama Rubber Co., Ltd.

motor vehicles whose products run the full range of parts from the smallest light bulb to tires.

All AIA Members and Associate Members are subject to the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. §§1391-1431) (Safety Act), and regulations promulgated thereunder by the National Highway Traffic Safety Administration (NHTSA). The Safety Act defines "manufacturer" as including importers (15 U.S.C. §1391(5)). While AIA Members and Associate Members are subject to the same provisions under which NHTSA has proceeded against Petitioner General Motors Corporation (GM), the risk of the now $800,000[5] penalty is of much greater significance to them. Their respective shares of the market are far smaller than that of GM, and the threatened penalty is therefore far larger on a per unit basis.[6]

Although neither AIA nor any of its individual members has participated in the prior proceeding in this case, even as an *amicus curiae*, we have closely followed the case because of its benchmark nature as the first fully developed alleged safety-related defect case. As such, the case had the potential of providing guidance for pending and future cases.

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[5] The maximum penalty was increased from $400,000 to $800,000 by Pub. L. 93-492, 88 Stat. 1470. The maximum $800,000 penalty is quickly reached since the penalty accrues at the rate of $1,000 per vehicle or item of equipment involved.

[6] GM's U.S. market share of passenger cars in 1976 was 47.22%, whereas the largest share of an AIA Member was 3.56% (Toyota) and some AIA Members' shares were less than .00013%, the smallest of those reported. Automotive News, 1977 Market Data Book Issue, p. 70.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The questions of the proper definition of "defect" and "motor vehicle safety" under the Safety Act and the judicial procedure for making determinations are of increasing importance as the NHTSA increases its emphasis on defects investigation.

This increase of NHTSA emphasis has been openly proclaimed by the agency to the press. The most recent example is the November 16, 1977 *New York Times* wherein it was reported on page A18:

> An example of the stepped-up Government activity is the increase in the number of cases opened by the Office of Defects Investigation of the National Highway Traffic Safety Administration. In the first nine months of this year, the office opened 23 cases, compared with four in all of 1976.
>
> "I don't know if we're going to get that same high number of units in the future, but I would say you will see probably more recalls in the future," said Lynn J. Bradford, director of the Office of Defects Investigation. "The issue here is that there will definitely be more activity in the investigation of defects."
>
> Mr. Bradford, who is 49 years old, was appointed to his post June 25, replacing Andrew Detrick, who had been head of the office for the previous five years.
>
> PANEL OF ATTORNEYS NAMED
>
> Another sign of increased activity in vehicle safety was the recent appointment by Joan Claybrook, head of the Federal traffic safety agency, of a panel of lawyers to serve as consultants for a year, reviewing the backlog of defects investigations.
>
> Stuart, *Number of Recalled Vehicles Nears 8-Million Mark,* N.Y. Times, November 16, 1977, at A18, col. 1

This is the view not only of NHTSA and the *New York Times* writer, but of others, as again reported by the *New York Times:*

> Clarence M. Ditlow 3d, head of the Washington-based Center for Auto Safety, said that, based on his study of the moves inside the highway traffic safety agency, both the number of recalls and units involved would be high for several more years.
>
> *ibid.*

As a part of NHTSA's increasing emphasis on defects investigations, AIA companies have perceived an ever expanding NHTSA view of what constitutes a "safety-related defect." It therefore appears inevitable that at some point there will have to be developed judicially stated limits on the scope of safety-related defects. That process was occurring on a slow, case-by-case basis (*e.g., General Motors Corp. v. United States,* ___ F.2d ___ (D.C. Cir. 1977, Dkt. No. 76-1744 and 76-1745; *United States v. Ford Motor Co.,* ___ F.2d ___ (D.C. Cir. 1976, Dkt. No. 76-0029); *United States v. General Motors Corp.,* 518 F.2d 420 (D.C. Cir. 1975); *Ford Motor Co. v. Coleman,* 402 F. Supp. 475 (D.D.C. 1975), *aff'd,* 425 U.S. 927 (1976)), until the majority's *per curiam* opinion in the court below in this case. That opinion, through its very lack of standards or definition, has not only clouded the little progress towards judicially stated standards, but it also encourages the expansive tendency of NHTSA.

It would be in the public interest to resolve sooner rather than later the scope of safety-related defects. This would permit the industry to make more promptly its own determinations[7] of when recall campaigns are appropriate. By so doing, remedies for true safety-related defects can be instituted at the earliest time to the clear benefit of the public without the wasteful expense of unnecessary recall campaigns. Whatever expense is involved in either defending NHTSA's orders for unnecessary recall campaigns or in conducting them must eventually be passed on to the consumers.

This case provides the Court with a unique opportunity to rationalize the safety-related defect issues. Not only would the Court be superseding the erroneous *per curiam* decision which both sets no standards and implicitly destroys the prior limited standards through its *per se* rule, but the Court would also have before it the record of the only trial to have taken place concerning an alleged safety-related defect.

II. The greatest singular failing of the decision below is its *per curiam* nature. It simply provides no positive guidance for the agency, the industry, or the District Courts in pending and future cases. Instead, it establishes what GM characterizes as a *per se* rule and what Judge Leventhal characterizes as a "conclusive presumption" commenting:

> The majority elevates facts which give rise to a strong suspicion of dangerousness into a conclusive presumption of the existence of a safety-related

[7] The vast majority of recall campaigns are conducted upon the manufacturers' initiative, pursuant to 15 U.S.C. §1411, rather than by NHTSA order, pursuant to 15 U.S.C. §1412.

> defect. I would allow the manufacturer the opportunity to dispel this justified apprehension by proof that failure due to the defect does not occur in a dangerous fashion and that the risk arising from the defect is therefore inconsequential.
>
> Appendix A to GM's Petition, p. 34a.

Although we have two lengthy and reasoned opinions to tell us what the law is *not* (the District Court opinion reversed *per curiam* and the dissent on appeal), we have nothing to indicate what the law *is*. The majority statement that it "agrees with much of Judge Leventhal's scholarly [dissenting] opinion" (Appendix A to GM's Petition, p. 2a) is of no help since we are not told with what the majority agreed (and what is therefore of precedential value) and with what it disagreed (and what is therefore of no precedential value). We are simply left with little guidance.

The best that can be said for the precedential value of the *per curiam* opinion is that it finds no definition of "motor vehicle safety" is required nor is a trial required in this case because the failures occurred while the vehicle was being driven (apparently no matter how slowly) and caused the driver to lose control of the vehicle (apparently no matter for how small a split second). We submit that the appellate majority fell prey to a simplistic and alarmist lay view that certain vehicle systems, here the steering system, are so critical to motor vehicle safety that anything less than perfect operation of such systems is *per se* an unreasonable risk of the accidents, death or injury. Judges Leventhal and Gasch, we believe, more soberly considered the matter one for systematic judicial consideration, including a trial where all the evidence can be considered.

III. On at least one issue, whether GM was entitled to trial, the four judges clearly split 2-2. Judges Gasch (the District Court judge) and Leventhal (the dissenting appellate judge) would permit GM an opportunity for examination of the evidence in a judicial setting whereas the two-judge appellate majority would deny that opportunity. This issue is especially important because it ultimately affects the question of whether there will ever be a due process proceeding on defect matters.

The NHTSA proceeding is not a due process hearing by statutory design. Whether or not by coincidence, it has worked out that in every case where NHTSA has made an initial determination of the existence of a safety-related defect followed by an agency "hearing" to afford the manufacturer an opportunity to present data, views and arguments, the final order thereafter issued by NHTSA[8] has not varied in any material respect from the initial determination. Not surprisingly, manufacturers have come to regard the agency proceeding, with its absence of any independent hearing officer or the right of cross-examination, as a formality to be observed on the way to the courthouse. The statutory scheme was intended to provide a trial *de novo*[9] where, for the first time, the manufacturer would be given a "due process" opportunity to establish its case. The *per curiam* decision offers no explanation on how the District Court can discharge its

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[8]This procedure was formerly set forth in 15 U.S.C. §1402, but is now found in substantially the same form in 15 U.S.C. §1412, as a result of the October 27, 1974 Amendments, Pub. L. 93-492, 88 Stat. 1470.

[9]H.R. Rep. No. 93-1191, 93rd Cong. 2d Sess. 17 (1974); *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 480 (D.D.C. 1975), *aff'd*, 425 U.S. 927 (1976).

trial *de novo* responsibilities in the face of the new *per se* rule.

This case would impose two new burdens for consideration by manufacturers interested in exercising their constitutional right to a due process hearing. First, to develop its entire case at the agency level, even knowing the virtually certain adverse outcome, in order to build a citable record when facing a motion for summary judgment in District Court.[10] This vain and useless act does nothing but increase the expense and aggravation of defending questionable NHTSA defect orders.

Second, by establishing an irrebuttable presumption in cases involving certain (unspecified) vehicle systems, the court below would make useless the preliminary injunction procedure cited in *Ford Motor Co. v. Coleman, supra,* to toll the assessment of the $800,000 penalty during the pendency of the litigation of the alleged safety-related defect. This issue is well discussed on pp. 16-18 of GM's Petition and need not be repeated here. Note, however, that while for the giants, GM and Ford, $800,000 may be the "fair price of adventure" (*Ford Motor Co. v. Coleman,* 402 F. Supp. at 489), *i.e.,* the penalty risk over and above the cost of the recall campaign and litigation costs if the safety-related defect case lost, for the smaller companies it is a significant barrier.[11] In the eleven-year

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[10]The agency's motion for summary judgment which the two-judge appellate majority would grant was based solely on its administrative record. Appendix D to GM Petition, p. 40a.

[11]By smaller companies, we mean substantially smaller than GM and Ford by any standard, including total assets, net capital, total sales in dollars or motor vehicle sales in units. Smaller companies include not only AIA companies but domestic companies like Checker, Excalibur, Avanti, and a host of truck manufacturers as well as parts manufacturers.

history of the Safety Act, only GM and Ford have dared seek to litigate alleged safety-related defect cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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RIVKIN SHERMAN AND LEVY

November 23, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-521

GENERAL MOTORS CORPORATION,
Petitioner
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CHRYSLER CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER GENERAL MOTORS CORPORATION

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BRIEF OF CHRYSLER CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER GENERAL MOTORS CORPORATION

PRELIMINARY STATEMENT

Pursuant to the written consent of General Motors Corporation ("GM") and the United States, Chrysler Corporation ("Chrysler") submits this brief as *amicus curiae* in support of GM's Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

This brief is directed to a single constitutional issue which we respectfully urge warrants the granting of

GM's petition. Chrysler contends that the Court of Appeals' majority opinion forecloses a motor vehicle manufacturer's constitutional right to present evidence to a trial court on the determinative issue of whether, under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1391 (1970)[1] ("the Act"), a defect exists in a motor vehicle which poses an "unreasonable risk" of accident, injury and death.[2]

INTEREST OF THE AMICUS CURIAE

Chrysler is a Delaware Corporation which is a major manufacturer of motor vehicles in the United States. As a manufacturer, Chrysler is directly affected by the operations of the National Highway Traffic Safety Administration ("NHTSA" or "the agency") and particularly by the agency's investigation of safety-related defects which may involve the potential for recalling hundreds of thousands of vehicles.

In the past Chrysler has found that very rarely will a conflict arise between a motor vehicle manufacturer and NHTSA as to the need to recall vehicles and repair defects if the engineering and field information clearly establishes that significant numbers of a particular item of motor vehicle equipment are failing with resulting physical injuries or a potential for such injury. It is only when statistical projections and isolated pieces of engineering data do not agree with field information and actual operational experience that NHTSA and the manufacturer may disagree as to the need for a recall campaign. This, of course, is only natural since the agency's mandate from Congress is to work to enhance motor vehicle safety and a manufacturer, while striving to

[1] The Act was amended in 1974 in respects not material to this litigation.

[2] This issue was alluded to but was not sufficiently developed in GM's Petition for a Writ of Certiorari, p. 15 n.10.

produce a safe vehicle, does not wish to institute a multi-million dollar recall campaign affecting hundreds of thousands of vehicles if the alleged defect does not pose an "unreasonable risk" to motor vehicle safety. Manufacturers are skeptical of such marginal recall campaigns because the very act of recalling hundreds of thousands of vehicles and permitting thousands of mechanics, possessing various degrees of experience, to work on the vehicles can itself cause more vehicle problems than are corrected.

The Act as passed by Congress recognized that disputes such as those noted above would arise between NHTSA and a manufacturer. Congress, therefore, provided a two-stage investigatory process for resolving such disputes. The first stage involves an informal public meeting initiated by NHTSA wherein the manufacturer has the opportunity to present its views and evidence to support its position that a defect does not exist or does not pose an unreasonable risk to vehicle safety. The second stage involves a trial *de novo* wherein the government has the burden of proving not only that a defect exists but that it poses an "unreasonable risk" to safety. The GM case is the first instance wherein a manufacturer has availed itself of the trial *de novo* and challenged the government's evidence as to the existence of an "unreasonable risk" to safety.

Chrysler believes that the Court of Appeals has construed the Act so as to effectively eliminate a motor vehicle manufacturer's due process right to present evidence to a court, and challenge the government's evidence, concerning the crucial issue of whether a defect exists which presents an "unreasonable risk" to motor vehicle safety. Chrysler urges this Court to grant GM's petition and review the Court of Appeals' opinion in light of this Court's past decisions holding that a *per se* rule against presenting evidence on the determinative

issue addressed by a statute is an unconstitutional denial of due process.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision is of critical importance to all motor vehicle manufacturers, since enforcement litigation under the Act is concentrated in the District of Columbia Circuit. The court's adoption of a *per se* rule for the determination of an unreasonable risk to motor vehicle safety precludes a manufacturer from introducing and having considered evidence bearing on the presence or absence of such a risk and effectively eliminates the manufacturer's constitutional right to challenge the informal administrative determination of a safety-related defect.

Section 152(a)(2) of the Act, 15 U.S.C.A. § 1412(a)(2) (1977 Supp.), empowers the Administrator[3] to issue recall orders only if a determination can be made that the manufacturer's vehicles contain a defect which represents an unreasonable risk of accident, injury, or death. See *House Committee on Interstate and Foreign Commerce, Report on Motor Vehicle and School Bus Safety Amendments of 1974*, H.R. REP. NO. 93-1191, 93 Cong. 2d Sess. 14. Thus, the Administrator does not have the power to order a recall of motor vehicles to correct any and all vehicle defects. See 42 Fed. Reg. 7146 (February 7, 1977) (regulations governing exemption of motor vehicles from recall on the ground that the defect is inconsequential as it relates to motor vehicle safety).

The legislative history of the Act demonstrates that Congress deliberately placed the "unreasonable risk" restriction on the power of the Administrator in recogni-

[3] The Administrator of NHTSA acts as the delegate of the Secretary of Transportation for the purpose of carrying out the requirements of the Act. 49 C.F.R. § 1.51(a) (1977).

tion of the fact that a more stringent standard would require such enormous outlays for the design and manufacture of motor vehicles that it would result in an impossible production standard. Inherent in this "unreasonable risk" standard is Congress' conclusion that the Administrator should only issue recall orders if, after a balancing of safety considerations and the cost of compliance involved in each particular situation, creditable and relevant evidence clearly establishes that society's interests are better protected by the issuance of a recall order. *United States* v. *General Motors Corp.*, 518 F.2d 420, 435 (D.C. Cir. 1975); See S. REP. No. 1301, 89 Cong. 2d Sess. 6 (1960); *Traffic Safety: Hearings on § 3005 Before the Senate Comm. on Commerce*, 89 Cong. 2d Sess. 56, 411 (1966); *cf. Ethyl Corp.* v. *Environmental Protection Agency*, 541 F.2d 1, 18 n.32, 28 n.52 (D.C. Cir. *en banc*), *cert. denied*, 426 U.S. 941 (1976); *United States* v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Any such rule of reason analysis requires the careful ascertainment and review of the facts of each particular situation. *Cf. White Motor Co.* v. *United States*, 372 U.S. 253, 261 (1963).

In carrying out the balancing analysis noted above, the Act provides a two-stage process for reviewing all relevant information, analyzing the existing risk factors, and making a final determination as to whether a safety-related defect which poses an unreasonable risk to motor vehicle safety exists in a manufacturer's vehicles. The first stage of analysis is carried out in an extremely informal *ex parte* procedure which provides a manufacturer with no due process protection.

NHTSA's normal investigatory process begins with the agency providing the manufacturer with customer complaints the agency has received on a particular subject, any preliminary test results the agency has developed, and, finally, a request that the manufacturer comment

on the agency's information and provide the agency with all information in the manufacturer's possession concerning the subject investigation. If the manufacturer's response to NHTSA includes a determination that an unreasonable risk to motor vehicle safety does not exist in the subject vehicles, and the agency disagrees with this conclusion, the matter is normally transferred to the Administrator or Chief Counsel for review.

This review process by the Administrator or Chief Counsel may take from several weeks to a year. Moreover, this review process is entirely *ex parte* in nature, and no information developed within the agency during the review, or collected by the agency from consumers or other interested groups, is presented to the manufacturer for its analysis and comment. Thus, a significant amount of time may pass during which evidence is developed or collected by NHTSA and the manufacturer is totally unaware of this evidence and unable to analyze the evidence for its truth and veracity. Indeed, in the past NHTSA has refused to provide voluntarily such information to manufacturers upon their request or provide the information in response to a formal Freedom of Information Act request.

After NHTSA reviews all evidence available to it in an *ex parte* atmosphere, the Administrator may issue an initial determination that the manufacturer's vehicles contain a defect which poses an "unreasonable risk" to motor vehicle safety. At this juncture the Act requires that the Administrator notify the manufacturer of his findings and present all information on which his determination is based. 15 U.S.C.A. § 1412(a) (1977 Supp.). The manufacturer is then afforded an opportunity to persuade the Administrator at an informal public meeting that either the defect does not exist or that it is not safety related. It is critical to note, however, that the agency's informal public meeting does not afford a manufacturer the right of confrontation, cross-examination, or other adjudicatory due process rights. In the past the Administrator has not, to Chrysler's knowledge, ever reversed his initial decision on the basis of evidence presented at the public meeting.[4]

The highly informal *ex parte* approach described above was developed by Congress to assure the speedy resolution of safety questions. Congress did not, however, totally ignore the due process rights of a manufacturer,

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[4] The Act provides that following the public meeting, if the Administrator determines that a defect exists which relates to motor vehicle safety and the manufacturer chooses to challenge this decision in District Court, the Administrator may order the manufacturer to issue a provisional notification to all affected vehicle owners which will contain:

> (A) a statement that the Secretary has determined that a defect which relates to motor vehicle safety, or failure to comply with a Federal motor vehicle safety standard, exists, and that the manufacturer is contesting such determination in a proceeding in a United States district court,
>
> (B) a clear description of the Secretary's stated basis for his determination that there is such a defect or failure,
>
> (C) the Secretary's evaluation of the risk to motor vehicle safety reasonably related to such defect or failure to comply,
>
> (D) any measures which in the judgment of the Secretary are necessary to avoid an unreasonable hazard resulting from the defect or failure to comply,
>
> (E) a statement that the manufacturer will cause such defect or failure to comply to be remedied without charge pursuant to section 1414, but that this obligation of the manufacturer is conditioned on the outcome of the court proceeding, and
>
> (F) such other matters as the Secretary may prescribe by regulation or in such order. 15 U.S.C.A. § 1415(b) (1977 Supp.)

Accordingly, the public is immediately made aware of any alleged safety defect determination even while the manufacturer exercises its due process rights to a trial *de novo*. Moreover, if the manufacturer does not prevail in the District Court trial, all owners who had work performed on their vehicles on the basis of the provisional notice may seek reimbursement from the manufacturer.

which were specifically excluded at the first stage of the agency's investigation. Congress provided that a manufacturer's constitutional due process rights would be protected under the Act by requiring, at the second stage of the agency's investigatory process, that a trial *de novo* be held with the burden of proof on the Government to prove, by a preponderance of the evidence, that a safety-related defect exists which requires the institution of a recall campaign. H.R. Rep. No. 93-1191, 93 Cong., 2d Sess., 17 (1974); *United States* v. *General Motors Corp., supra*, 518 F.2d at 426; *Ford Motor Co.* v. *Coleman*, 402 F. Supp. 475, 480 n. 12 (D.D.C.), *aff'd*, 425 U.S. 927 (1976). Thus, Congress was aware that evidence developed by the NHTSA in an *ex parte* fashion may on its face suggest a safety-related defect posing an unreasonable risk to motor vehicle safety. Congress was also aware, however, that a manufacturer must be provided his constitutional right to offer evidence on the actual existence of an unreasonable risk to motor vehicle safety.

The Court of Appeals decision simply eliminates the constitutional and congressionally-mandated right of due process provided to a manufacturer at the second stage of the investigatory process.[5] The Court of appeals in its

[5] The Court of Appeals decision also completely ignores the need for, and benefit of, a "risk analysis" in any statutorily mandated hearing process which is designed to weigh issues affecting the public health against issues affecting private interests. In a situation such as the pitman-arm case, where it was impossible for either NHTSA or GM to prove with any certainty the exact number of future accidents which would occur, it is essential that the trier of fact be presented with all available evidence bearing on the potential "risk" and "harm" associated with a proposed cause of action. Only by reviewing all available evidence is the trier of fact able to ascertain the best available estimate of the potential risk of harm and, in turn, determine if the potential risk is within the "unreasonable risk" standard developed by Congress. *Ethyl Corp.* v. *Environmental Protection Agency, supra*, 541 F.2d at 18; *Reserve Mining Co.* v. *Environmental Protection Agency*, 514 F.2d 492, 519-20 (8th Cir. 1975 *en banc*); *Carolina Environmental Study Group* v. *United States*, 510 F.2d 796, 799 (D.C. Cir. 1975).

per curiam opinion completely ignored the evidence presented to the trier of fact and on which the trier of fact found that an "unreasonable risk" to motor vehicle safety was not supported by the Government's evidence. Instead of reviewing the evidence presented to the trier of fact, the Court of Appeals adopted a *per se* rule which reads into the Act a requirement that the evidence established at the agency's public meeting may be sufficient to deny a manufacturer the right to present evidence on the existence of an unreasonable risk to motor vehicle safety.

As Judge Leventhal noted in his partial dissent, "* * * if this case had arisen near the beginning of the car's service life, when there was little real-life experience with the cars, such proof would suffice to obtain enforcement of a notification order without waiting to see how many people would be hurt or killed." In actuality, however, the matter presented to the Court of Appeals was quite different. Extensive operational evidence was in existence and was the basis for GM's contention to the trial court that an unreasonable risk to motor vehicle safety did not exist. The trier of fact in viewing all the evidence agreed with GM. The Court of Appeals, completely ignoring GM's evidence, disagreed.

The adoption by the Court of Appeals of a *per se* rule regarding the existence of a defect posing an unreasonable risk to motor vehicle safety is contrary to past decisions of this Court regarding the due process rights of litigants. This Court has uniformly held that a person is unconstitutionally denied the right to due process if he is prevented, because of an irrebuttable presumption, from offering evidence on a determinative statutory question affecting the rights of the person. *Cleveland Board of Education* v. *Lafleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441, 452 (1973); *Stanley* v. *Illinois*, 405

U.S. 645 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971). The right both to present evidence and at least to have it considered is mandated by the Due Process Clause of the Constitution, since if a person's rights and obligations are determined on the basis of the existence or non-existence of a specific fact, it is essential to the fair administration of justice that the person be able to present and have considered evidence bearing on this issue of fact. The Court of Appeals decision precludes consideration of evidence by GM, or by any other motor vehicle manufacturer, on the crucial issue of whether a defect which poses an unreasonable risk to motor vehicle safety exists, if NHTSA can establish a mere untested statistical record which appears to support the existence of an unreasonable risk to motor vehicle safety.

Chrysler is genuinely concerned that if the Court of Appeals decision is left standing, situations which in the past may not have been found to present a situation requiring the recall of motor vehicles will, in the future, result in the issuance of recall orders which manufacturers will not be able to rebut, because they are without the due process protections of a full trial *de novo*. An instance of such a situation could foreseeably occur if NHTSA's recently-mandated "air bag" requirement eventually involves a manufacturer's air bag accidentally detonating while the owner is driving the motor vehicle. In such a situation NHTSA could possibly present evidence at an informal public hearing that (1) the manufacturer has sold a large number of replacement air bags; (2) reported accidental air bag detonations have occurred while vehicles were being driven; and (3) when an air bag accidentally detonates, the driver momentarily loses his vision. This hypothetical situation would require a District Court, under the Court of Appeals opinion, to grant NHTSA's motion for summary judgment. In such a case the manufacturer would be prevented from presenting

evidence establishing that (1) reasons exist for large replacement sales other than accidental detonation; (2) although accidental detonations have occurred while vehicles were in motion, not a single accident or injury has resulted; and (3) experimental data currently in existence and developed by NHTSA indicates that accidental detonation of an air bag, although resulting in loss of vision of the operator, is so instantaneous that it is unlikely that a total loss of control or vehicle accident would result. Accordingly, even though existing data and possible future operational experience could support the proposition that an "unreasonable risk" to motor vehicle safety does not exist from the accidental detonation of an air bag, the Court of Appeals narrow interpretation of the Act would require a recall of such vehicles.[6]

This case of first impression presents this Court with a unique opportunity to analyze the validity of the Court of Appeals conclusion. The record below is most informative in indicating that when the trier of fact reviewed the evidence and judged the demeanor of witnesses, which the Court of Appeals eventually found to be irrelevant, the trier of fact concluded that the Government could not establish that a safety-related defect existed.

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[6] As a matter of fact, the Court of Appeals opinion goes so far that, assuming the government's evidence in regard to the pitman-arm was precisely as it was presented in this case, GM would be prevented from submitting irrefutable proof that in fact pitman-arm failures could occur *only* when the vehicle was at a complete stop and no harm could, therefore, result to the occupant. Thus, the effect of the Court of Appeals opinion is to cause any evidence presented by the government, no matter how untested or hypothetical, to be raised to a level where it cannot be questioned even in a federal court. This hypothetical situation makes clear that the Court of Appeals position not only is unconstitutional but can produce a result ridiculous on its face.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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